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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

No. 258

In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1954

No. .....

In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner the respondent-appellant, Walter C. Durst, a private trustee for creditors the real parties in interest, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, petitions for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to hear and review the order made February 23, 1955, denying permanent stay, injunction and restraining order on appellant's applications therefor. (Appx. "A".) By order of this Court dated May 20, 1955, the time for filing a petition for certiorari was extended to July 23, 1955. (Appx. "A".)

A.
Opinions Below.

The opinions of the Referee in Bankruptcy are found in Appendix B and in the record as set forth. The opinions of the District Court in Bankruptcy are found in Appendix C and in the record as set forth.

B.
Grounds on Which Jurisdiction Is Invoked.

(Text appears in Appendix D.)

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of:

28 U. S. C., Sec. 1254, in part;

28 U. S. C., Sec. 2101, in part;

Bankruptcy Act, Sec. 24 (11 U. S. C. Sec. 47);

Bankruptcy Act, Sec. 416 (11 U. S. C., Sec. 816);

Fifth Amendment to the United States Constitution.

Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 475 (11 U. S. C. Sec. 875);

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 509);

C.
Questions Presented.

1. Is the appellant entitled to supersedeas without bond under Rule 62(f) of the Rules of Civil Procedure where he has complied with all State Law and statutory requirements, as against a trustee in bankruptcy a successor resulting *cestui que trust* whose petitioner asserts has no right of possession of the assets of the general assignment and whose claims petitioner assets are in con-

travention of state law of trusts and in violation of title 28 U. S. C., Sec. 1652?

2. Does the appellee, a resulting *cestui que trust* of the general assignment, have possessory rights in and of assets of the trust?

3. Does the Bankruptcy Court have jurisdiction over the general assignment prior to confirmation of plan or arrangement in Chapter XII?

4. Is the execution of a non object of the trust a fraud on the object of the trust?

5. Is it true or false that the order of the Bankruptcy Court supersedes and nullifies all the provisions of the general assignment for the benefit of creditors made four years and five months prior to the petition in bankruptcy with reference to what the assignee should do with the property?

6. Does Title 28, Section 1652 apply to Bankruptcy Courts?

D.

The Statutes Which the Case Involves.

(Pertinent text appears in Appendix D.)

Fifth Amendment to the Constitution of the United States;

Bankruptcy Act, Sec. 2(a)(21)(11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 25(b) (11 U. S. C., Sec. 48(b);

Bankruptcy Act, Sec. 401 (11 U. S. C., Sec. 801);

Bankruptcy Act, Sec. 402 (in part) (11 U. S. C., Sec. 802);

Bankruptcy Act, Sec. 475 (11 U. S. C., Sec. 875);

Bankruptcy Act, Secs. 506, 507, 508, and 509 (11 U. S. C., Secs. 906 and 909;

28 U. S. C., Secs. 1651 and 1652;

Federal Rules of Civil Procedure, Rule 62(f);

Cal. Civ. Code, Secs. 870, 1060 in part, 2279;

Cal. Code Civ. Proc., Secs. 389, 944, and 946 in part.

E.
Statement.

The main case involves the construction of Bankruptcy Act, Section 2(a)(21), as to an "assignee for the benefit of creditors" and "assignments" under Chapter XII, for the first time since it has been amended by the Chandler Act of 1938, and interpreted by the Referee in bankruptcy as deleting the provisions of the four month limitation. The common law general assignment [R. 14-17] here involved was created November 25, 1949, by recordation thereof and of deeds, bill of sale, and crop mortgages. [Ex. "E," pp. 11-24.] No common law general assignment case appears in the reports since the 1934 amendments of the Bankruptcy Act, which apparently dealt with some of the aspects of the four month period of limitation.

The debtors in 1949 owned two ranches and other property. They were heavily pressed by indebtedness, and both ranches were under default and in danger of foreclosure. The creditors were pressing heavily. The Franzier-Lempke Act had expired. Petitioner commencing in 1922 has served as receiver and trustee in Los Angeles during which year he was secretary to the then District Judge Oscar A. Trippet, now deceased. Petitioner was called into the case by P. M. Schwabacher the

attorney for the Kalpakoffs [Ex. "F" pp. 1-4, line 18 thereof]. Documents signed by the Kalpakoffs were approved by P. M. Schwabacher their attorney [Ex. "E" pp. 8, 9, 10]. On November 25, 1949, the owners of the ranches made a common law general assignment for the benefit of their creditors under State law and State practice in California [R. 14-17]. Their only interest in the two ranches after the expiration of the four month period was, and is, as resulting *cestui que trust*, entitled to the surplus, if any, after creditors the real parties in interest, were paid 100 cents on the dollar, if possible. The assignee in three year's time by operation of the Los Angeles County ranch, lease of the Kern County ranch, sale of city property, and sale of personal property was able to secure ranch lienholder defaults by December 1, 1952 [R. 51, 52]. Also in 1952 the debtors prevented a $75,000, cash sale of the Kern County ranch and said sale was lost [Ex. "E" pp. 204-205]. The operating alfalfa beds on the Los Angeles County ranch were so depleted that the assignee ceased to "deem it proper" to continue operations. In 1953 creditors, the real parties in interest, demanded payment and the assignee sought to sell a ranch or ranches for payment to the creditors of 100 cents on the dollar, if possible the surplus, if any, to the assignor as resulting *cestui que trust* of the general assignment. On April 23, 1953, the assignor brought suit in the State Court to vacate transfers, for appointment of Receiver and for general equitable relief in which suit all creditors were ordered made indispensable party defendants. A sale of the Kern County ranch for $70,000 Ex. "E" pp. 242-245] was interfered with by *lis pendens* filed [Ex. "E", p. 222]. The lienholder creditors on both ranches came into default and foreclosures were started.

The debtors to avoid foreclosures, on April 1954 filed their original Chapter XII Proceedings under the Federal Bankruptcy Act, wherein they agreed to pay creditors 100 cents on the dollar, from the operation or sale of a ranch or ranches [R. 6] and scheduled their only interest in the general assignment as resulting *cestui que trust* thereof [R. 8]. The foreclosures were restrained [Ex. "H"]. The debtors signed their names to documents to carry out the $70,000 sale aforesaid [Ex. "E" pp. 242-245].

On May 26, 1954, the debtors amended their petition, and schedules [R. 9] wherein they also set forth their only interest as resulting *cestui que trust* of the general assignment [R. 9, 10] and elected the primary jurisdiction of the aforesaid State Court [Ex. "I", Sheet 3, proposed Real property arrangement]. No plan or arrangement has been confirmed herein.

On June 2, 1954 inconsistently with such election of the primary jurisdiction under State law and of the State Court, the debtors brought summary proceedings [R. 11-20] in which indispensable creditors were not named respondents in the Bankruptcy Court against the assignee for turnover of the assets of the general assignment.

The assignee appeared specially [R. 92] challenged jurisdiction [R. 20, 21, 22] asserted adverse claim, prior pending plenary state Court equity suit, omissions of indispensable party creditors of the general assignment as respondents [R. 92-107].

Turnover and accounting were ordered June 15, 1954 [R. 22-26]. Stay was denied [R. 26-30]. Petition for review [R. 30-35] was filed, thereafter the trustee in bankruptcy brought proceedings to enforce turnover [R.

112-125], at which the assignee, appeared specially [Ex. "K"], challenged the jurisdiction alleged want of equity [R. 166-167; see R. 131, 132] respecting offer of proof filed accounting [Exs. "A", "B", "C", "D", and "E"] and was certified to the District Court [R. 35-38], appeared specially [R. 44-67], objected to jurisdiction [R. 71-73; Ex. "F"] moved to dismiss citation for contempt [R. 133-134] the District Court affirmed the referee in all particulars [R. 186], objected to certificates [R. 184, 186-188, 190; Ex. "L" and "M"; R. 196-199] denied injunction, and restraining order, and affirmed denial of stay [R. 134-138, 186]. The assignee under threat of punishment for contempt deposited the conveyances with the Clerk of the District Court to abide judgment of the appellate courts [R. 200; Ex. "O"]. The aforesaid accounting and conveyances deposited constitute full compliance with the aforesaid turnover order of June 15, 1954. No attack has ever been made on either the accounting or the conveyance, or that petitioner has not administered his trust impartially, fairly and accurately. All the orders of the District Court were appealed [R. 140-141].

The trustee in Bankruptcy proceeded with the notice of sale of assets included in the aforesaid conveyance, resulting in a second petition for review, a second appeal and a pending petition for review. Also pending is a fourth petition for review of order confirming sale, now under submission by the District Court which may ripen into a third appeal.[1] A petition by the trustee in Bankruptcy to dismiss the prior pending plenary State Court equity suit is now under submission by the referee in bankruptcy

[1]Each of these petitions for review become necessary to preserve the *status quo* of the litigation and to avoid waiver.

which may ripen into a petition for review and appeal. A petition by the lienholder of the Kern County ranch to lift the order restraining foreclosure sale is pending before the Referee, petitioner in his response made a suggestion of either increase the bond of the Trustee in Bankruptcy to $132,150, or granting supersedeas without bond for the protection of creditors the real parties in interest and may ripen into a petition for review and appeal. In the Court of Appeals the appellee's petition to dismiss is under submission, and appellant's petition for stay of mandate without bond is pending.

F.

Reason for Granting the Writ.

This Case Presents Important Questions of Bankruptcy Law Which Have Not, but Should Be, Determined by This Honorable Court. The Fair Construction and Application of State Law Is Involved.

(1) Petitioner Is Entitled Under State Law Applicable to Bankruptcy Under 28 U. S. C., Section 1652 to Supersedeas Without Bond Under Rule 62F Federal Rules of Civil Procedure.

The refusal of the courts below to grant stay, injunction and restraining order, appears to be a departure from the following rule, statute and cases:

28 U. S. C., Sec. 1652;

Federal Rules of Civil Procedure, Rule 62(f);

Cal. Code Civ. Proc., Sec. 944, and second sentence of 946;

Brown v. Detroit Trust Co. (6th Cir.), 193 Fed. 622, 627,

". . . Proceedings to review . . . suspended the operation of the referee's order. . . ."

United States Oil & Land Co. v. Bell (9th Cir.), 219 Fed. 785, 790, 791;

Anderson-Cottonwood Irr. Dist. v. Mason (9th Cir.), 135 F. 2d 112, 114;

Ripka v. Philco Corporation, 65 Fed. Supp. 21, 39;

In re Deneale v. Young, Case No. 3785, 2 Cranch C. C. 200, 7 Fed. Cas. p. 460;

Archer v. Miller, 192 Cal. 67.

(2) Irreparable Damage to Creditors Since 1952.

The creditors, the real parties in interest, relying on state law procedure under the assignment have suffered irreparable loss since 1952 when the debtors began interfering with sales, in that they have been kept out of their money, and by reason of the litigation have lost the rental value of both ranches of about $5,000.00 to $10,000.00 per year for the year 1953, 1954, and to date in 1955. The creditors total upwards of $110,000.00, of which upwards of $30,000.00 have had no payment on account for over five years, seven months and 20 days, all of whose claims are fixed as to liability and liquidated as to amount in the general assignment and they have vested rights therein under applicable State law and in the prior pending State Court equity suit [Ex. "E" pp. 223-235]. The creditors have no adequate remedy at law in that the bond of the trustee in bankruptcy is fixed at $5,000.00 [R. 110] and the assets of the general assignment inventory at $132,150.00 [Ex. "D" pp. 10, 11, 12].

(3) BANKRUPTCY ACT, SECTION 2(a)(21).

The interpretation in the main case by the Bankruptcy Court of Bankruptcy Act, Section 2(a)(21) involves judicial legislation in that the Referee in contravention of the trust created by the general assignment ruled:

> ". . . The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the Assignee should do with the property." [R. 123.]

Said order and ruling apparently supersedes and nullifies California statutory law and decisions of the California Supreme Court as follows:

Cal. Civ. Code, Sec. 2279;
Cal. Civ. Code, Sec. 870;
Cal. Civ. Code, Sec. 1060;
Cal. Code Civ. Proc., Sec. 389;
Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;
Forbes v. Scannell, 13 Cal. 242;
Neel v. Barnard, 24 Cal. 2d 406, 421;
McPherson v. Parker, 30 Cal. 455;

and the following Federal statute and cases:

28 U. S. C. A., Sec. 1652;
Chittenden v. Brewster, 69 U. S. 191, 17 L. Ed. 839;
Emil v. Hanley, 318 U. S. 515, 87 L. Ed. 954;
Kohn v. Ryan, 31 Fed. 636, 638;
Galbraith v. Kline, 7 F. 2d 682, 684;
Horne v. Title Ins. & Trust Co., 79 Fed. Supp. 91;
Ponzi v. Fessenden, 258 U. S. 254, 66 L. Ed. 607;
Sharp v. Bonham, 213 Fed. 660, 668;
Louisville Trust Co. v. Knott, 130 Fed. 820, 825;
Erie R. Co. v. Tompkins, 304 U. S. 64, 87 L. Ed. 954;

Gallaway v. Benton, 336 U. S. 132, 93 L. Ed. 553;

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;

Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413;

Galbraith v. Vallely, 256 U. S. 46, 65 L. Ed. 823.

G.

The Court of Appeals Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings, or so Far Sanctioned Such Departure by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

The trustee in bankruptcy is a successor resulting *cestui que trust* purportedly in possession alleged to be tortious.

Galbraith v. Kline, 7 F. 2d 682, 684;

Kohn v. Ryan, 31 Fed. 636, 638;

Re Matter of Carroll, 274 N. Y. 288, 298, 8 N. E. 2d 864, 866, 867;

Bouvier, 1934, p. 159, "*Cestui que trust* . . . has no legal title to the estate, as he is merely a tenant at will if he occupies the estate." (Cites cases.)

The petitioner, a private trustee for creditors the real parties in interest, as assignee for the benefit of creditors is entitled to the presumption of good faith.

Neel v. Barnard, 24 Cal. 2d 406, 421.

The turnover order requiring conveyance makes no provision that the trust created by the general assignment follows the land, or that the trustee in bankruptcy shall execute the object of the trust.

Cal. Civ. Code, Secs. 870, 1060, 2279;

Horne v. Title Insurance & Trust Co., 79 Fed. Supp. 91, 95.

The turnover order makes no provision in the event of reversal thereof, or for judgment either way in the prior pending plenary State Court equity suit, or for the rights of interested parties to be reinstated, upon no plan or arrangement being confirmed.

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 909).

The turnover order of the bankruptcy court apparently supersedes and nullifies the following leading general assignment cases:

Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;

Forbes v. Scannell, 13 Cal. 242, 278, 285, 287 and 288;

McPherson v. Parker, 30 Cal. 455, 457 (Cited in *Mitaw v. Rodden,* 149 Cal. 1, 7, and *Lake v. Dowd,* 207 Cal. 290, 293.)

The turnover order is without regard to the primary jurisdiction of the prior pending plenary State Court equity suit, as to which the debtors made an election in their amended schedules and their proposed Real Property Arrangement [Ex. "I", Sheet 3]. The turnover order apparently supersedes and nullifies the following cases in this respect:

Chittenden v. Brewster, 69 U. S. 191, 196, 17 L. Ed. 839;

Ponzi v. Fessenden, 258 U. S. 254, 259, 66 L. Ed. 607;

Sharp v. Bonham, 213 Fed. 660, 668.

The turnover order apparently supersedes and nullifies Title 28, Section 1652, and *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, that State Law governs

rights, which are preserved in bankruptcy though remedies may be changed.

In re De Tamble, 88 F. 2d 893, 895.

The bankruptcy court has no power to enlarge the debtors' interest as same existed at the date of bankruptcy.

Callaway v. Benton, 336 U. S. 132, 93 L. Ed. 553.

The turnover order of the bankruptcy court supersedes and nullifies the leading case on the interpretation of Bankruptcy Act, Sec. 2(a)(21), *Emil v. Hanley,* 318 U. S. 515, 87 L. Ed. 954, and *Emil v. Hanley,* 130 F. 2d 369, 373, in the dissent is cited the *Matter of Greyling Realty Corp.,* 74 F. 2d 734, 737, as an example of a state court receivership being superseded because the issue of fraud therein set forth was avoided by the parties and could ". . . not be determined in the court of primary jurisdiction . . ." The issue of fraud is raised and can be determined in the prior pending plenary State Court equity suit. [See answer of defendant Walter C. Durst, Ex. "E", pp. 223-235 thereof.] (See, also, *Harrison v. Chamberlain,* 271 U. S. 191, 70 L. Ed. 897.)

The turnover order apparenty supersedes and nullifies summary jurisdiction cases:

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;

Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413;

Galbraith v. Vallely, 256 U. S. 46, 49, 65 L. Ed. 823.

The turnover apparently supersedes and nullifies California law that requires creditors indispensable parties to be made respondents.

Cal. Code Civ. Proc., Sec. 389;

Lake v. Dowd, 207 Cal. 290;

Mitau v. Rodden, 149 Cal. 1.

Reversal.

This petition is presented by reason of the far reaching nationwide interest, of all Credit Grantors, in each of the 48 states and the territories of the United States, where either statutory or common law general assignments for the benefit of creditors are used. On behalf of the Real Parties in Interest, and on behalf of all Credit Grantors throughout the United States and the Territories thereof who may be affected by the ruling aforesaid, and by reason of petitioner's status as a trustee, petitioner prays that, if, upon examination of the record in connection with the above mentioned orders denying stay, injunction and restraining order, and omission to rule on supersedeas, it shall appear to the Court that the bankruptcy court lacked jurisdiction to make the turnover order appealed, or abused its discretion in refusing stay, injunction, or restraining order, as supersedeas [R. 226-313], then, and in that event this Court may reverse the bankruptcy court before rendition of judgment by the Court of Appeals.

Albin v. Cowing Joint Co., 317 U. S. 211, 87 L. Ed. 212;

North Carolina R. v. Story, 268 U. S. 288, 292, 69 L. Ed. 959;

Arizona Edison Co. v. Southern Sierra Power Co. (9th Cir.), 17 F. 2d 739, 740.

The applications of appellant in the Court of Appeals for stay, injunction, and restraining order, are referred to at pages of the Record [R. 226 to 300]. The application for supersedeas is referred to at pages of the Record [R. 301 to 308]. The application for supersedeas has apparently not been acted upon by the Court of Appeals as of the date of signing this petition.

Conclusion.

This Court has not heretofore had the questions at bar directly presented and we respectfully pray that the petition for a writ of certiorari be granted.

WALTER C. DURST,
A Private Trustee, for Creditors the Real Parties in Interest as Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially, Petitioner.

MORRIS LAVINE,
Attorney for the Petitioner, a Private Trustee, Appearing Specially.

WALTER C. DURST,
Of Counsel.

APPENDIX "A."

At a Stated Term, to wit: The October Term 1954, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-third day of February in the year of our Lord one thousand nine hundred and fifty-five.

PRESENT:

Honorable Albert Lee Stephens, Circuit Judge, Presiding;

Honorable James Alger Fee, Circuit Judge;

Honorable Jon Wiig, District Judge.

In the Matter of the Estates of Jack P. Kalpakoff, etc. No. 14655.

ORDER DENYING MOTIONS PENDING APPEAL.

ORDERED (1) Motion of appellant to make permanent stay of proceedings in the District Court in Bankruptcy and before the Referee in Bankruptcy pending appeal, (2) Motion of appellant to expunge documents after stay, (3) Motion for order to referee to file supplemental certificate on review to be included in record on appeal, and (4) Motion of appellant for injunction and restraining order, etc., be, and hereby are denied.

I Hereby Certify that the foregoing is a full, true, and correct copy of an original Order made and entered in the within-entitled matter.

Attest my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of March, 1955 [R. 310].

/s/ Paul P. O'Brien
Clerk, U. S. Court of Appeals
for the Ninth Circuit

No. 14655

United States Court of Appeals
for the Ninth Circuit

In the Matter of the Estates of
Jack P. Kalpakoff, etc.

CERTIFIED COPY OF ORDER

Supreme Court of the United States
No. ....., *October Term,* 1954

In the Matter of the Estates of
Jack P. Kalpakoff and Mary Kalpakoff

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for Walter C. Durst, Trustee, it is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 23, 1955.

/s/ Wm. C. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 20th day of May, 1955.

APPENDIX B.

Referee's Opinion

Referee in Bankruptcy: On Turnover [R. 106-107]:

"The Referee: There is no trial necessary, You are the assignee for the Benefit of Creditors, and you have property of the debtors, and in your capacity as Assignee the Bankruptcy Act confers jurisdiction on the Court in a proceeding under Chapter twelve to require the Assignee to surrender the property and an accounting, regardless of the time the assignment was made.

Mr. Durst: I want to read the Act, Section II, I believe, 21 of the Act.

The Referee: I have read it in its entirety, and what do you find in there that would justify this court in not requiring the Assignee for the Benefit of Creditors to turn over the assets?

Mr. Durst: I submit, your Honor, that a reading of this section for the delivery of the possession and the accounting, that none of the rights which the assignee has are taken away from him. I believe the Assignee stands in exactly the same position as a mortgagee in possession, and I again cite the Preas case.

The Referee: I will read to you the language:

'Require the assignee for the benefit of creditors to deliver the property in their possession or under their control.'

Mr. Durst: I will state that the property which I have is this:

'The general assignment is supported by deeds to the two ranches; the general assignment is further supported by a promissory note in the amount of $95,000, which

was the total debts of the estate at that time, secured by crop mortgages on both of the ranches.'

The Referee: I am sorry, Mr. Durst I think I understand the situation. The petition is granted."

REFEREE'S OPINION, CONTINUED.

Referee in Bankruptcy: On Attachment to Enforce Turnover [R. 121-123]:

"The Referee: . . . Now, my attention has not been called by anybody to any provision of Chapter XII itself—

Mr. Durst: 475.

The Referee: Which says this Court does not have jurisdiction to require an assignee for the benefit of creditors to turn over, notwithstanding the fact that the assignment was made more than four months before the filing of the petition.

Mr. Durst: I request that you read aloud Section 475.

The Referee: All right; Section 475 (reading):

'The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver of to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement.'

The Section I have just read is not applicable to the question at hand.

Mr. Durst: I submit it is a—

The Referee: I am sorry, Mr. Durst. I don't want any argument as to that.

Mr. Durst: I ask for a continuance.

The Referee: Article III of Chapter XII sets up the "Jurisdiction, Powers, and Duties of the Court." Section 411 of that Article provides that:

'Where not consistent with the provisions of this Chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.'

I find nothing in Article III specifically referring to the power of the Court to require assignees to turn over.

Now, Mr. Durst, this Court has been functioning here, This Referee, for 18 years and I do not recall another instance where the Court found it necessary to certify anybody for contempt proceedings, and it is with the deepest regret that this court experiences that situation in this case, because this Court is convinced that you seem to be laboring under a false impression here. You repeat and say over and over again that because of the assignment given you, you have no power to do anything with the property involved in the assignment except that given you in the assignment itself, and you don't seem to realize and understand the provisions of the Bankruptcy Act in a proper case terminate that power given you as Assignee for the Benefit of the Creditors, and requires him to do something else, namely, to deliver up possession to the person designated by the Bankruptcy Court. *The order*

of the Bankruptcy Court supersedes and nullifies all the provisions of the Assignment with Reference to what the assignee should do with the property. It is so simple that it doesn't even permit of argument. The Bankruptcy Act vests the Bankruptcy Court with authority to require an Assignee to do certain things; and after a hearing and an admission on your part that you had the status of Assignee for the Benefit of Creditors under a general assignment, an order was made directing you to turn the property over to a designated trustee, and you have failed to do so, and there is nothing remaining for this court to do except certify you for contempt.

Mr. Durst: In that connection I move for a continuance of two weeks.

The Referee: The motion is denied.

Mr. Durst: Also, in that connection, to be permitted to offer here in this matter the Answer of the Assignee in the State Court action, which suit has been referred to in this proposed real property arrangement, that being Superior Court Action transferred to Los Angeles, entitled:

'In the Superior Court of the State of California, in and for the County of Los Angeles, No, TRANSFERRED TO LOS ANGELES, S.F.C. 914. ANSWER OF WALTER C. DURST.'

The Referee: Your offer is denied, on the ground that it is entirely immaterial." (Emphasis added.)

REFEREE'S OPINION INTERPRETED

Referee in Bankruptcy Indicates Turnover Order Premature: During the pendency of the proceedings in the District Court, the referee wrote the following letter [Ex. "N"]:

"UNITED STATES DISTRICT COURT
Southern District of California Central Division
BENNO M. BRINK, Referee in Bankruptcy
327 Federal Building, Temple & Spring Streets,
Los Angeles 12, California.

August 13, 1954.

Siemon & Siemon
Attorneys at Law
259 Haberfelde Building
Bakersfield, California

Re: Jack P. Kalpakoff, Debtor #60963-T
Mary Kalpakoff, Debtor #60964-T

Dear Sirs:

I am preparing and will shortly file my certificate on the petitions for review in the above-mentioned cases, so that the same may be in the file when the contempt matter again comes on for hearing on September 13, 1954.

As the Referee in the above case, I feel it is my duty to call your attention to the fact that it has occurred to me that the order of June 15, 1954 may have been premature in the light of the following extract from Section 2a(21) of the Bankruptcy Act.:

'Require . . . assignees for the Benefit of Creditors . . . to deliver the property in their possession or

under their control to the receiver or trustee appointed under this Act or, *where an arrangement or a plan under this act has been confirmed and* such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement on plan, and in all such cases to account to the court for the disposition . . . of the property of such bankrupt or debtors. . . .'

Very truly yours,

BENNO M. BRINK

Referee in Bankruptcy

BMB:a"

APPENDIX C.

District Court Opinion.

District Court [R. 200]:

"The Court: Just answer yes or no. Have you complied with Referee Brink's order to turnover? I don't want any argument. I want just an answer.

Have you complied with it or haven't you?

Mr. Durst: I hand to the clerk a letter dated November 29, 1954—

The Court: Please Mr. Durst, will you answer the question? I know you have legal objections, and we are going to protect them for you.

Mr. Durst: Thank you, your Honor, Yes, I have complied with it.

The Court: All right.

Mr. Siemon: May I ask—

Mr. Durst: I ask this document, which I have handed in, be spread upon this record in its entirety, a letter to your Honor delivering a deed, in accordance with the order, and that the contents, that the document itself be marked as an exhibit, Exhibit "O" and that the contents of the letter and of the deed be admitted in support of the objections to evidence warranting the finding of contempt.

District Court Opinion Continued

[R. 209].

The Court: . . . I don't like to sign a judgment binding a faithful officer of the court in contempt."

APPENDIX D.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of Title 28 U. S. C. Section 1254, which reads in part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . ."

Title 28 U. S. C., Sec. 2101:

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.
>
> (e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

Bankruptcy Act, Sec. 24, 11 U. S. C., Sec. 47:

> "§24. Jurisdiction of Appellate Courts. A. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy

in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, However,* that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only; *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the appellate Court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Bankruptcy Act, Sec. 416, 11 U. S. C., Sec. 416:

"Sec. 416. Where not inconsistent with the provisions of this chapter the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

5TH AMENDMENT TO THE CONSTITUTION.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual serv-

ice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bankruptcy Act, Sec. 2(a)(21), 11 U. S. C., Sec. 11 (a)(21):

> "(21) Requires receivers of trustees appointed in proceedings not under this act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided Howevver,* That such delivery and accounting shall not be required except in proceedings under chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such Property by such receiver, trustee, assignee or agent,

either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Bankruptcy Act, Sec. 25(b), 11 U. S. C., Sec. 48(b):

"Receivers and Trustees shall not be required in any case to give bond when they take appeals."

Bankruptcy Act, Secs. 401, 402 (in part), 11 U. S. C., Secs. 801, 802 (in part):

"Section 401. The provisions of this chapter shall apply exclusively to proceedings under this chapter.

"Section 402 (in part). The provisions of Chapter I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter. . . ."

Bankruptcy Act, Sec. 475, 11 U. S. C., Sec. 875:

"Section 475. The court may direct the debtor, his trustee, any mortgagees indenture trustee, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

Bankruptcy Act, Sections 506, 507, 508 and 509, 11 U. S. C., §§906-909:

"Section 506. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceeding in a court of the United States of any State in which a receiver or a trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made."

"Section 507. Such prior proceeding shall be stayed by the filing of a petition under this Chapter. The Trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the possession thereof. The Trustee or debtor in posession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage."

"Section 508. The judge shall make such provisions as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable compensation for services rendered and of the proper cost and expenses incurred therein as may be allowed by the judge."

"Section 509. Upon dismissal of a proceeding under this Chapter, such prior proceeding shall become reinstated and the judge shall allow the reasonable costs and expenses under this chapter, including the allowances provided for in Article XI of this

chapter, and shall make appropriate provision for the retransfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings."

Title 28 U. S. C., Sec. 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

"(b) An alternative writ of rule nisi may be issued by a justice or a judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, §90, 63 Stat. 102."

Title 28 U. S. C., Sec. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Federal Rules of Civil Procedure, Rule 62. Stay of Proceedings to enforce a Judgment.

"(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein,

to such stay as would be accorded him had the action been maintained in the courts of the state."

California Civil Code, Section 870, which reads:

"Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust is absolutely void."

California Civil Code, Section 1060, which reads in part:

"1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, *other than a power in trust which is imperative,* is releasable, . . ." (Emphasis added.)

California Civil Code, Section 2279, which reads:

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

California Code of Civil Procedure, Section 389, which reads:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an Action for the recovery of real or personal property, or to determine conflicting claims

thereto, a person, not a party to the action, but Having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment."

California Code of Civil Procedure, Section 944, which reads:

"If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the Clerk with whom the judgment or order is entered to abide the judgment of the appellate court."

California Code of Civil Procedure, Section 946, which reads in part:

". . . and the court may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right. . . ."

OCT 31 1
HAROLD B. WILL

IN THE

Supreme Court of the United States

October Term, 1955.

No. [redacted]498

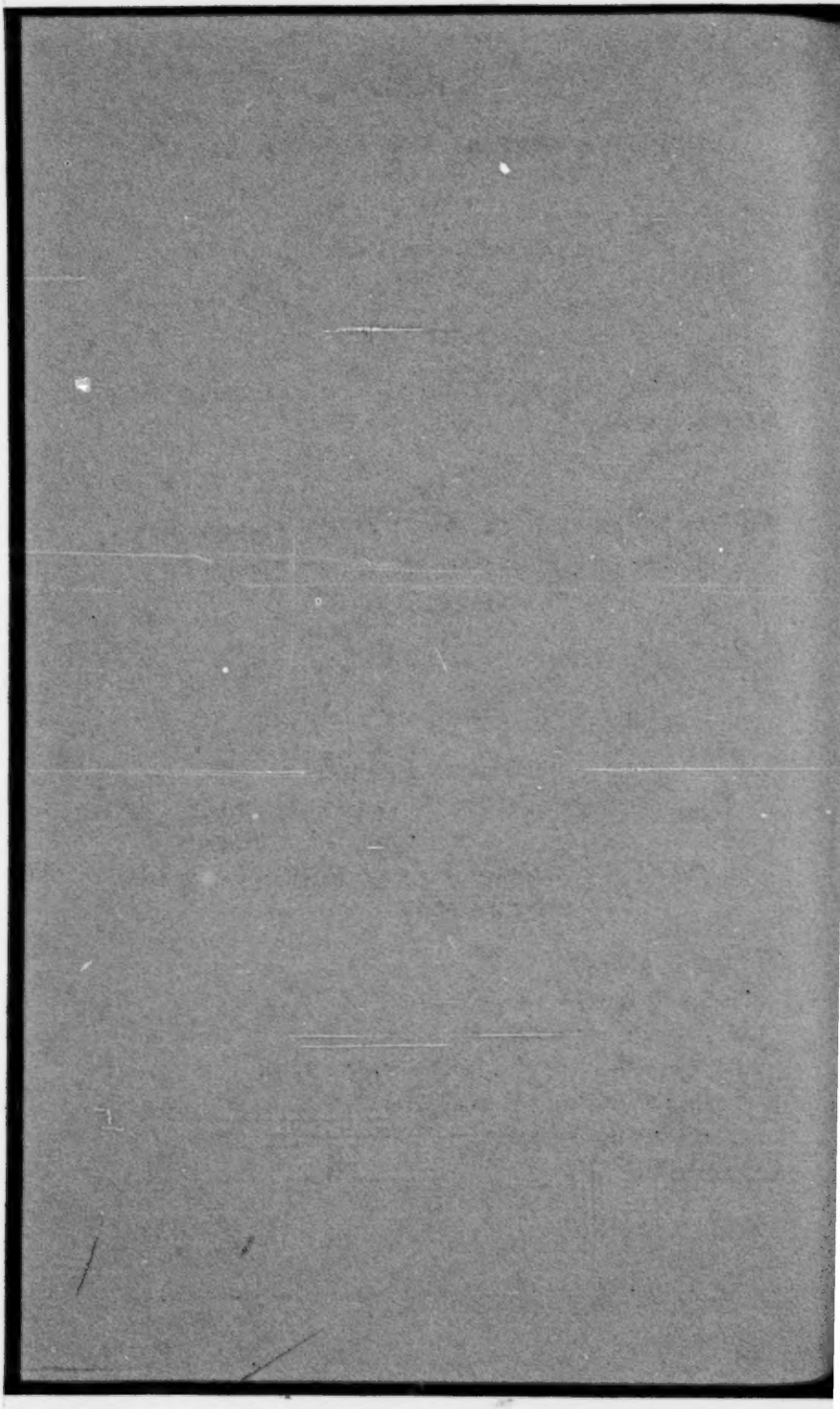
In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Los Angeles 14, California,
Attorney for the Petitioner, Appearing Specially.

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IN THE

Supreme Court of the United States

October Term, 1955.

No. 258

In the Matter of the Estates of Jack P. Kalpakoff and Mary Kalpakoff.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Walter C. Durst, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, petitions for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, to hear and review the order made August 1, 1955, denying stay of mandate and dismissing appeal for mootness (Appx. "A") and from the orders of February 23, 1955, denying motions pending appeal. (Appx. "B.")

REFEREE'S OPINION THAT TURNOVER ORDER MAY BE PREMATURE IN VIEW OF SECTION 2(a)(21), BANKRUPTCY ACT.

Referee in Bankruptcy Indicates Turnover Order Premature: During the pendency of the proceedings in the District Court, the referee wrote the following letter [Ex. "N"]:

"UNITED STATES DISTRICT COURT
Southern District of California Central Division
BENNO M. BRINK, Referee in Bankruptcy
327 Federal Building, Temple & Spring Streets,
Los Angeles 12, California.

August 13, 1954.

Siemon & Siemon
Attorneys at Law
259 Haberfelde Building
Bakersfield, California

Re: Jack P. Kalpakoff, Debtor #60963-T
Mary Kalpakoff, Debtor #60964-T

Dear Sirs:

I am preparing and will shortly file my certificate on the petitions for review in the above-mentioned cases, so that the same may be in the file when the contempt matter again comes on for hearing on September 13, 1954.

As the Referee in the above case, I feel it is my duty to call your attention to the fact that it has occurred to me that the order of June 15, 1954 may have been premature in the light of the following extract from Section 2a(21) of the Bankruptcy Act:

'Require . . . assignees for the Benefit of Creditors . . . to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, *where an arrangement or a plan under this act has been confirmed and* such

property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement on plan, and in all such cases to account to the court for the disposition . . . of the property of such bankrupt or debtors. . . .'

Very truly yours,

BENNO M. BRINK
Referee in Bankruptcy

BMB:a"

A.

Opinions Below.

The opinions of the Referee in Bankruptcy on Turnover is found in Appendix "C" and in the record as set forth and on contempt in Appendix "D" and the record. The opinions of the District Court in Bankruptcy are found in Appendix "E" and in the record as set forth.

B.

Grounds on Which Jurisdiction Is Invoked.

(Text appears in Appendix "F.")

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of:

28 U. S. C., Sec. 1254, in part;

28 U. S. C., Sec. 2101, in part;

Bankruptcy Act, Sec. 24 (11 U. S. C. Sec. 47);

Bankruptcy Act, Sec. 416 (11 U. S. C., Sec. 816);

Fifth Amendment to the United States Constitution;

Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 475 (11 U. S. C., Sec. 875);

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 909).

C.
Questions Presented.

1. Whether the referee in bankruptcy subsequent to his order although writing the letter of August 13, 1954, expressing the opinion that the turnover order may have been premature, failed to comply with the holding of *Wagnon v. Pease,* 104 Ga. 417, at page 430, that: "The best and the only proper way of disposing of erroneous rulings is to promptly recall them when the opportunity for so doing is presented," and by virtue of said letter should the order be reversed and remanded for further proceedings to be had in accordance with the referee's letter?

2. Whether the bankruptcy court has jurisdiction over the general assignment for the benefit of creditors prior to confirmation of a plan of arrangement in Chapter XII, and whether Section 475 of the Bankruptcy Act requires a plan of arrangement and confirmation thereof before the bankruptcy court acquires jurisdiction of the general assignment, and whether Section 2(a)(21) of the Bankruptcy Act has to be read together with Section 475, and whether indispensable party creditors may be omitted from turnover proceedings?

3. Did the Bankruptcy Court err in affirming the referee's order to sell the assets of the general assignment under the "Deed" which made no provision that the trust follows the land, or for judgment either way in the State Court suit, notwithstanding appellant's challenge to the jurisdiction based upon California law that the trust follows the land, or make provisions for the reinstatement of the general assignment or the State Court suit as provided in Bankruptcy Act, Section 509?

4. Did the Referee in Bankruptcy have jurisdiction to order the sale of assets of the general assignment after the appeal in case No. 14655, and while the "Deed" deposited with the Clerk to abide the judgment of the courts of appeals was absent from the Court files, and did the Court of Appeals have jurisdiction in the matter until the said "Deed" is returned to the Court files and is re-established in the condition in which same was so deposited (Appx. "K").

5. Whether the btors and the trustee in bankruptcy are estopped from serting a position contrary to that of appellant where ir motion to dismiss for mootness was granted and ap llant moved to reverse and vacate the order of dismissa in accordance with, and by reason of, the doctrines of *United States v. Munsingwear, Inc.*, 340 U. S. 36; *Securities and Exchange Commission v. Harrison,* 340 U. S. 908; and *Acheson v. Droesse,* 197 F. 2d 574, and whether the granting of the motion to dismiss for mootness in said appeal No. 14655 makes *res judicata* all of the law points raised by the assignee for the benefit of creditors being points I to XXXII in said appeal [R. 211-225] (Appx. "I," Appx. "H")?

6. Whether the trustee in bankruptcy by recording the deed deposited with the clerk to abide the outcome of the judgment of the Courts of Appeal, became responsible for the fulfillment and execution of the trust created by the general assignment to sell the assets, pay the creditors 100 cents on the dollar, if possible, and distribute the surplus, if any, to the debtors as resulting *cestui que trust* as their scheduled interest appears?

7. Whether the removal by the trustee in bankruptcy from the Court Clerk and the Clerk's office of the valid live "Deed" deposited by appellant with the Clerk of

the District Court to abide the judgment of the courts of appeal, *ipso facto,* transformed the said valid live "Deed" so deposited, into an invalid dead "Deed" of no force and effect whatsoever, and whether said removal destroys the trust escrow established by the deposit of the said "Deed" with the Clerk under the doctrine of *Phelps v. American Mortgage Co.,* 40 Cal. App. 2d 361, and the provisions of California Code of Civil Procedure, Section 944?

8. Are the debtors and the trustee in bankruptcy trespassers and invaders of the *res* of the trust created by the general assignment where an appeal is pending and a "Deed" has been deposited in Court to abide the judgment of the courts of appeal, and do the debtors as resulting *cestui que trust,* or the trustee in bankruptcy as successor resulting *cestui que trust* of the common law general assignment have possessory right or any rights in and to the assets of the trust created by the debtors voluntarily for the benefit of their creditors, save as such resulting *cestui que trust?*

9. Where the resulting *cestui que trust* of the general assignment have so scheduled their interest in their schedules in bankruptcy [R. 5-10] and, notwithstanding said interest so scheduled, seek to attack the trust, does the rule of *Erie R. Co. v. Tompkins,* 304 U. S. 64, apply in these proceedings, where the general assignment so attacked is created under the laws of the State of California more than four months prior to bankruptcy?

10. Whether Title 28, U. S. C., Sec. 1652 applies to the within litigation instituted by debtors and enforced by the trustee in bankruptcy in the bankruptcy courts?

11. Whether the principles of *Erie R. Co. v. Tompkins,* 304 U. S. 64, 87 L. Ed. 954 and Title 28, U. S. C.

Sec. 1652, apply in the interpretation of the status of the "Deed" and the determination of the merits of this appeal?

12. Whether Title 28, U. S. C., Sec. 1652, makes the following California law rules of action in the within civil cause, to wit, California Civil Code, Division 2, Part 2, Title IV, Uses and Trusts, and Division 2, Part 4, Title IV, Transfer of Property, and Division 3, Part 4, Title 8, Trusts, and particularly Sections 870, 1060 in part, and 2279, and California Code of Civil Procedure, Sections 389, 944, and 946 in part, including decisions of the Supreme Court of the State of California, respecting common law general assignment and establishes said California law as applicable herein?

13. Whether it is true or false that either Bankruptcy Act Section 2(a)(21) is unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States, extended to apply without limit in time, inherently and as construed and applied without limit as to time in this case, where no plan or arrangement confirmed, or whether said section as applied in this case supersedes and nullifies without limit as to time, all the provisions of the common law general assignment created under California law more than four years and five months prior to bankruptcy, with reference to what the assignee should do with the property; or, whether the Bankruptcy Court or the trustee in bankruptcy have violated 28 U. S. C. Section 1652, which reads:

> "The laws of the several states, except where the constitution or treaties of the United States or Acts of Congress otherwise require or provide shall be regarded as rules of decision in civil actions in the

courts of the United States, in cases where they apply"?

14. Whether the petitioner has performed his duty to preserve the rights of the creditors of the common law general assignment, under the holding of *Chittenden v. Brewster,* 69 U. S. 191, 17 L. Ed. 839, and under applicable California Law?

15. Whether the trustee in bankruptcy is a representative of the creditors who is bound by the contentions and authorities presented by the petitioner in support of the creditors' rights, or whether the trustee in bankruptcy is free to purposely or otherwise fail to consider a substantial contention supported by authorities to the end that by such evasion he asserts a position directly opposed to the petitioner's contentions and authorities respecting the sale of the assets for the payment of creditors 100 cents on the dollar, if possible, the distribution of the surplus, if any, to the resulting *cestui que trust?*

16. Whether the trustee in bankruptcy a marriage and blood relation of the debtors [R. 99] has the discretion to ignore appellant's contention and authorities requiring the immediate sale of the assets for the payment of the creditors 100 cents on the dollar, if possible, and the distribution of the surplus, if any, to the debtors as resulting *cestui que trust* as their scheduled interest appears, and whether the trustee in bankruptcy has the discretion to substitute in lieu and instead of said California law requirements of general assignments, that which, in the trustee in bankruptcy's belief is a more beneficial mode of disposition of the property and more consonant with what he believes would be the real wish of the debtors his marriage and blood relations?

17. Is the appellant entitled to supersedeas without bond under Rule 62(f) of the Rules of Civil Procedure where he has complied with all State Law and statutory requirements, as against a trustee in bankruptcy a successor resulting *cestui que trust* who petitioner asserts has no right of possession of the assets of the general assignment and whose claims petitioner asserts are in contravention of state law of trusts and in violation of Title 28, U. S. C., Sec. 1652?

18. Whether respondents' resulting *cestui que trust* of the general assignment have possessory rights in and of assets of the trust, and, whether the execution of a non-object of the trust a fraud on the object of the trust?

19. Have the questions raised by the appeal become moot by reason of petitioner's compliance under protest [Appx. "K"; Ex. "O," Dist. Ct., part thereof released to Mr. Siemon] with the turnover order now on appeal, said compliance being accomplished by accounting made and conveyance deposited with the Clerk of the United States District Court [R. 200; Appx. "K"] to abide the judgment of the Courts of Appeal, where no attack has been made on the accounting, the conveyance, or that petitioner has not impartially, fairly and accurately administered the private trust created by the General Assignment November 25, 1949, over four years and five months prior to bankruptcy, in litigation in the State Court over one year prior to bankruptcy, in which upwards of $30,000 of the creditors have had no payment for over five years and ten months, and where the District Court by minute order provided: "It is further ordered 'Deed' be released to Mr. Siemon for purposes of recordation" (Appx. "L"), and same has not been returned to the Court files in the condition so deposited or at all?

D.

The Statutes and Cases Which the Case Involves.

(Pertinent text of statutes appears in Appendix "D.")

Fifth Amendment to the Constitution of the United States;

Bankruptcy Act, Sec. 2(a)(21) (11 U. S. C., Sec. 11(a)(21));

Bankruptcy Act, Sec. 25(b) (11 U. S. C., Sec. 48(b));

Bankruptcy Act, Sec. 401 (11 U. S. C., Sec. 801);

Bankruptcy Act, Sec. 402 (in part) (11 U. S. C., Sec. 802);

Bankruptcy Act, Sec. 475 (11 U. S. C., Sec. 875);

Bankruptcy Act, Secs. 506, 507, 508, and 509 (11 U. S. C., Secs. 906 and 909);

28 U. S. C., Secs. 1651 and 1652;

Federal Rules of Civil Procedure, Rule 62(f);

California Civil Code, Division 2, Part 2, Title IV, Uses and Trusts, and Division 2, Part 4, Title IV, Transfer of Property, and Division 3, Part 4, Title 8, Trusts;

Cal. Civ. Code, Secs. 870, 1060 in part, 2279;

Cal. Code Civ. Proc., Secs. 389, 944, and 946 in part;

United States v. Munsingwear, Inc., 340 U. S. 36;

Securities and Exchange Commission v. Harrison, 340 U. S. 908;

Acheson v. Droesse, 197 F. 2d 574.

E.

Statement.

The Circuit Court of Appeals Dismissed the Appeal in This Case for Mootness.

In the Court of Appeals the appellee's petition to dismiss for mootness (Appx. "G") was granted and appellant's petition for stay of mandate without bond was denied, and appellant's motions were denied, appellant's motion to reverse and remand the cause with instructions to vacate (Appx. "H") is pending. Said motion was made under the doctrines of *United States v. Munsingwear, Inc.*, 340 U. S. 36; *Securities and Exchange Commission v. Harrison*, 340 U. S. 908; *Acheson v. Droesse*, 197 F. 2d 574 (Appx. "I," Appx. "H").

For statement to the merits see Appendix "M."

F.

Reason for Granting the Writ.

This Case Presents Important Questions of Bankruptcy Law Which Have Not, but Should Be, Determined by This Honorable Court. The Fair Construction and Application of State Law Is Involved.

(1) THROUGH THE GRANTING OF THE APPELLEE'S MOTION TO DISMISS FOR MOOTNESS AND APPELLANTS MOTION TO REVERSE AND VACATE, ALL APPELLANTS LAW POINTS [R. 211-225], APPELLANT ASSERTS, ARE ESTABLISHED AS THE LAW OF THE CASE.

Petitioner's basic point asserted to be established as the law of the case is that Bankruptcy Act, Section 2(a)(21) is unconstitutional under the due process clause of the Fifth Amendment to the Constitution of the United States, inherently and as construed and applied herein that

> "The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the assignee may do with the property." [R. 123.]

(2) THIS COURT SHOULD DECIDE WHETHER THE QUESTIONS INVOLVED BECAME MOOT WHEN THE UNITED STATES MARSHAL WAS STANDING BY TO TAKE PETITIONER TO JAIL IF HE DID NOT COMPLY WITH THE TURNOVER ORDER.

This case involves the question of mootness allegedly arising through enforced compliance with turnover order [R. 22] by protest (Appx. "K") and deposit of a conveyance ordered, with the Clerk of the District Court. By said turnover order the assignee for the benefit of creditors, without just or any cause, was ordered to convey the *res* of his trust, without the consent of the creditors or opportunity for them to be heard [R. 106], to the resulting *cestui que trust*. Thereby, purportedly, the legal title was transferred to the exclusion of all rights of the creditors, the beneficiaries of the trust created by the general assignment. The debtors in their schedules and amended schedules [R. 5-10] laid no greater claim to or interest in the assets of the trust except as resulting *cestui que trust*. California Civil Code, Section 870, provides that a deed in contravention of the express terms of a trust is absolutely void. The land in question was held in trust for the benefit of all the creditors, and no order confirming plan or arrangement had been made. Nevertheless the petitioner was ordered to turnover the *res*, although the bankruptcy court had no jurisdiction over the subject matter of the *res*. However, the District Court carried out the threat of the referee by ordering petitioner to show cause why he should not be held in contempt. Petitioner vigorously protested, but, with the club of contempt over his head. Petitioner complied. He did not thereby waive his statutory right of appeal which Congress gave him in Section 24 of the Bankruptcy Act.

Petitioner challenged the jurisdiction [R. 20, 22, 44, 71; Ex. "F" and Ex. "K"] and opposed all attacks under the authority of *Chittenden v. Brewster,* 69 U. S. 191, and under the authority of California law. Petitioner attacked the constitutionality of Section 2(a)(21) of the Bankruptcy Act as it was extended to apply wtihout limit as to time, and permitted the referee in bankruptcy and the District Court to compel turnover, where rights had vested in the assignee and the creditors. Such rights would be destroyed by a turnover order made over four years and five months after the creation of the general assignment. The Court of Appeals did not hear the matter on its merits.

(3) That Congress Had Expressed Generally a Time Limit of Four Months in Bankruptcy Matters, Behind Which It Will Not Go. The Law Generally Has Fixed a Reasonable Time. Where No Time Limit Is Fixed in Which a Thing Should Be Done, Six Months Time May Be a Reasonable Time, But Four Years and Five Months Is an Unreasonable Time.

The trial judge nevertheless overruled all of the challenges to the jurisdiction, made a finding of contempt [R. 186; Appx. "J"] on November 22, 1954 (on November 26, 1955, petitioner applied to a judge of the Court of Appeals for a stay, which was denied), denied a motion to dismiss the contempt proceeding for insufficiency of evidence [R. 191], refused to expunge [R. 126] a purported reporter's transcript which required service of process by United States Marshal to obtain [R. 79] and which allegedly fails to set out the proceedings had, the discussion and arguments, verbatim, or correctly, or at all. After the close of the hearing requiring deposit of

the "Deed" with the Clerk, the District Court by minute order dated November 29, 1954, provided: "It is further ordered 'Deed' be released to Mr. Siemon for purposes of recordation" (Appx. "K," Appx. "L").

The case then went to the Court of Appeals where a motion for dismissal for mootness was made (Appx. "G") and the dismissal for mootness granted (Appx. "A").

Petitioner filed a motion to Reverse and to remand the cause with instructions to vacate and set aside orders and dismiss for mootness (Appx. "H"), which motion is now pending.

Notice of Constitutional question filed (Appx. "I").

The Court of Appeals for the Ninth Circuit should have heard the case on its merits.

(4) PETITIONER IS ENTITLED UNDER STATE LAW APPLICABLE TO BANKRUPTCY UNDER 28 U. S. C., SECTION 1652 TO SUPERSEDEAS WITHOUT BOND UNDER RULE 62F FEDERAL RULES OF CIVIL PROCEDURE.

This question should have been decided by the Court of Appeals on its merits.

The refusal of the courts below to grant stay, injunction and restraining order, appears to be a departure from the following rule, statute and cases:

28 U. S. C., Sec. 1652;

Federal Rules of Civil Procedure, Rule 62(f);

Cal. Code Civ. Proc., Sec. 944, and second sentence of 946;

Brown v. Detroit Trust Co. (6th Cir.), 193 Fed. 622, 627,

". . . Proceedings to review . . . suspended the operation of the referee's order. . . ."

United States Oil & Land Co. v. Bell (9th Cir.), 219 Fed. 785, 790, 791;

Anderson-Cottonwood Irr. Dist. v. Mason (9th Cir.), 135 F. 2d 112, 114;

Ripka v. Philco Corporation, 65 Fed. Supp. 21, 39;

In re Deneale v. Young, Case No. 3785, 2 Cranch C. C. 200, 7 Fed. Cas. p. 460;

Archer v. Miller, 192 Cal. 67.

(5) Irreparable Damage to Creditors Since 1952.

The creditors, the real parties in interest, relying on state law procedure under the assignment have suffered irreparable loss since 1952 when the debtors began interfering with sales [Ex. "E", pp. 204-205], in that they have been kept out of their money, and by reason of the litigation have lost the rental value of both ranches of about $5,000.00 to $10,000.00 per year for the years 1953, 1954, and to date in 1955. The creditors total upwards of $110,000.00, of which upwards of $30,000.00 have had no payment on account for over five years, and eleven months, all of whose claims are fixed as to liability and liquidated as to amount in the general assignment and they have vested rights therein under applicable State law and in the prior pending State Court equity suit [Ex. "E," pp. 223-235]. The creditors have no adequate remedy at law in that the bond of the trustee in bankruptcy a marriage and blood relation of the debtors [R. 99] is fixed at $5,000.00 [R. 110] and the assets of the general assignment inventory at $132,150.00 [Ex. "D", pp. 10-12].

From the debtors' point of view the delays appear profitable for the reason that it now appears that although the trustee in bankruptcy sought to sell the Lan-

caster 160-acre ranch for $55,000 which is the subject of the third appeal, current advertising material respecting Lancaster may prove said price to be wholly inadequate. Said advertising material received by petitioner indicates that the population in Lancaster has tripled in the last three years; that in the Antelope Valley in which Lancaster is located during the last year over 5,000 homes were built and that twice as many are expected in 1955, and that construction costs for stores and residences during 1954 were over $35,000,000. That Lockheed, Northrop and North American are all in production at the mammoth Palmdale (near Lancaster) Air Base, that Convair is now building a plant, and that Bendix will be building soon. It is entirely possible that the Lancaster property might sell for sufficient to pay a greater part of the liabilities of the general assignment. During the contempt and other hearings petitioner received an offer for the two ranch properties of $130,000 [R. 148, 182].

(6) Bankruptcy Act, Section 2(a)(21).

The interpretation in the case by the Bankruptcy Court of Bankruptcy Act, Section 2(a)(21), we contend, involves judicial legislation in that the Referee in contravention of the trust created by the general assignment ruled:

> ". . . The order of the Bankruptcy Court supersedes and nullifies all the provisions of the assignment with reference to what the Assignee should do with the property." [R. 123.]

Said order and ruling apparently supersedes and nullifies California statutory law and decisions of the California Supreme Court as follows:

Cal. Civ. Code, Sec. 2279;
Cal. Civ. Code, Sec. 870;
Cal. Civ. Code, Sec. 1060;
Cal. Code Civ. Proc., Sec. 389;
Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;
Forbes v. Scannell, 13 Cal. 242;
Neei v. Barnard, 24 Cal. 2d 406, 421;
McPherson v. Parker, 30 Cal. 455;

and the following Federal statute and cases:

28 U. S. C. A., Sec. 1652;
Chittenden v. Brewster, 69 U. S. 191, 17 L. Ed. 839;
Emil v. Hanley, 318 U. S. 515, 87 L. Ed. 954;
Kohn v. Ryan, 31 Fed. 636, 638;
Galbraith v. Kline, 7 F. 2d 682, 684;
Horne v. Title Ins. & Trust Co., 79 Fed. Supp. 91;
Ponzi v. Fessenden, 258 U. S. 254, 66 L. Ed. 607;
Sharp v. Bonham, 213 Fed. 660, 668;
Louisville Trust Co. v. Knott, 130 Fed. 820, 825;
Erie R. Co. v. Tompkins, 304 U. S. 64, 87 L. Ed. 954;
Gallaway v. Benton, 336 U. S. 132, 93 L. Ed. 553;
Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;
Louisville Trust Co. v. Commingor, 184 U. S. 18, 46 L. Ed. 413;
Galbraith v. Vallely, 256 U. S. 46, 65 L. Ed. 823.

G.

The Court of Appeals Has so Far Departed From the Accepted and Usual Course of Judicial Proceedings, or so Far Sanctioned Such Departure by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

The petitioner in the Court of Appeals opposed the dismissal of the cause for mootness on the basis of the following authorities:

United States v. W. T. Grant Co., 345 U. S. 629 at 634, 97 L. Ed. 1303;

Bakery Drivers Union v. Wagshal, 333 U. S. 437;

Fiswick v. United States, 329 U. S. 211, 222;

Labor Board v. General Motors Corp., 179 F. 2d 221.

This Court should grant certiorari upon the authority of the above.

Should it be determined that the Court of Appeals erred in dismissing for mootness, other asserted departures of the Court of Appeals are set forth in Appendix "N."

Reversal.

This petition is presented to determine questions of importance in the law of bankruptcy of far reaching nationwide interest to all Credit Grantors, in each of the 48 states and the territories of the United States, where either statutory or common law general assignments for the benefit of creditors are used. It has been estimated by the National Association of Credit Managers that of comparable assets there are twice as many general assignment cases throughout the United States and the territories as there are bankruptcies of comparable

assets. On behalf of all Credit Grantors throughout the United States and the Territories thereof who may be affected by the ruling aforesaid, and by reason of petitioner's status as an assignee for the benefit of creditors, petitioner prays that, if, upon examination of the record in connection with the above mentioned orders denying stay, granting dismissal for mootness and denial of motions, it shall appear to the Court that the bankruptcy court lacked jurisdiction to make the turnover order appealed, or abused its discretion in refusing stay, injunction, or restraining order, as supersedeas [R. 226-313], or that the Court of Appeals was in error in dismissing for mootness, then, and in that event this Court may reverse the bankruptcy court before rendition of judgment by the Court of Appeals in the two appeals now pending and undetermined, and may reverse the bankruptcy court on the merits in this appeal No. 14655 in the Court of Appeals based upon Appendices "M" and "N," and the petition and record in connected case No. 258, October Term, 1955, incorporated herein by reference and made a part hereof.

Albin v. Cowing Joint Co., 317 U. S. 211, 87 L. Ed. 212;

North Carolina R. v. Story, 268 U. S. 288, 292, 69 L. Ed. 959;

Arizona Edison Co. v. Southern Sierra Power Co. (9th Cir.), 17 F. 2d 739, 740.

The applications of appellant in the Court of Appeals for stay, injunction and restraining order, are referred to at pages of the Record [R. 226-300]. The application for supersedeas is referred to at pages of the Record [R. 301-308]. The application for order reversing and vacating dismissal for mootness, has apparently not been

acted upon by the Court of Appeals as of the date of signing this petition (Appx. "H"). All orders as to which petitioner seeks reversal are set forth in Appendix "O." The court may, if deemed proper, relegate all matters to the state court suit.

Conclusion.

This Court has not heretofore had the questions at bar directly presented and we respectfully pray that the petition for a writ of certiorari be granted.

MORRIS LAVINE,

Attorney for the Petitioner, Appearing Specially.

WALTER C. DURST,

Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially, Petitioner, and of Counsel.

APPENDIX "A."

United States Court of Appeals for the Ninth Circuit.

In the Matter of the Estates of Jack P. Kalpakoff (District Court No. 60963-T) Mary Kalpakoff (District Court No. 60964-T), Debtors. No. 14655.

ORDERS.

MOTION FOR STAY OF MANDATE.

MOTION TO DISMISS APPEAL.

Before: Stephens, Fee, and Chambers, Circuit Judges.

The motion for a stay of issuance of mandate in the above entitled cause which was submitted to the court on July 11, 1955, is denied.

The motion to dismiss the appeal in the above entitled cause which was submitted to the court on May 23, 1955, is hereby granted.

Dated: August 1, 1955.

/s/ ALBERT LEE STEPHENS,
/s/ JAMES ALGER FEE,
/s/ RICHARD H. CHAMBERS,
United States Circuit Judges.

(ENDORSED) Filed: August 8, 1955.

Paul P. O'Brien, Clerk.

APPENDIX "B."

At a Stated Term, to wit: The October Term 1955, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Wednesday, the twenty-third day of February in the year of our Lord one thousand nine hundred and fifty-five.

PRESENT:

Honorable Albert Lee Stephens, Circuit Judge, Presiding;
Honorable James Alger Fee, Circuit Judge;
Honorable Jon Wiig, District Judge.

In the Matter of the Estates of Jack P. Kalpakoff, etc. No. 14655.

ORDER DENYING MOTIONS PENDING APPEAL.

ORDERED (1) Motion of appellant to make permanent stay of proceedings in the District Court in Bankruptcy and before the Referee in Bankruptcy pending appeal, (2) Motion of appellant to expunge documents after stay, (3) Motion for order to referee to file supplemental certificate on review to be included in record on appeal, and (4) Motion of appellant for injunction and restraining order, etc., be, and hereby are denied.

I Hereby Certify that the foregoing is a full, true, and correct copy of an orginal Order made and entered in the within-entitled matter.

Attest my hand and the seal of the United States Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 4th day of March, 1955 [R. 310].

/s/ PAUL P. O'BRIEN,
Clerk, U. S. Court of Appeals for the Ninth Circuit.

APPENDIX "C."

REFEREE'S OPINION ON TURNOVER.

Referee in Bankruptcy: On Turnover [R. 106-107]:

"The Referee: There is no trial necessary, You are the assignee for the Benefit of Creditors, and you have property of the debtors, and in your capacity as Assignee the Bankruptcy Act confers jurisdiction on the Court in a proceeding under Chapter twelve to require the Assignee to surrender the property and an accounting, regardless of the time the assignment was made.

Mr. Durst: I want to read the Act, Section II, I believe, 21 of the Act.

The Referee: I have read it in its entirety, and what do you find in there that would justify this court in not requiring the Assignee for the Benefit of Creditors to turn over the assets?

Mr. Durst: I submit, your Honor, that a reading of this section for the delivery of the possession and the accounting, that none of the rights which the assignee has are taken away from him. I believe the Assignee stands in exactly the same position as a mortgagee in possession, and I again cite the Preas case.

The Referee: I will read to you the language:

'Require the assignee for the benefit of creditors to deliver the property in their possession or under their control.'

Mr. Durst: I will state that the property which I have is this:

'The general assignment is supported by deeds to the two ranches; the general assignment is further supported by a promissory note in the amount of $95,000, which was the total debts of the estate at that time, secured by crop mortgages on both of the ranches.'

The Referee: I am sorry, Mr. Durst, I think I understand the situation. The petition is granted."

APPENDIX "D."

Referee's Opinion on Contempt.

Referee in Bankruptcy: On Attachment to Enforce Turnover [R. 121-123].

"The Referee: . . . Now, my attention has not been called by anybody to any provision of Chapter XII itself—

Mr. Durst: 475.

The Referee: Which says this Court does not have jurisdiction to require an assignee for the benefit of creditors to turn over, notwithstanding the fact that the assignment was made more than four months before the filing of the petition.

Mr. Durst: I request that you read aloud Section 475.

The Referee: All right; Section 475 (reading):

'The court may direct the debtor, his trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement.'

The Section I have just read is not applicable to the question at hand.

Mr. Durst: I submit it is a—

The Referee: I am sorry, Mr. Durst. I don't want any argument as to that.

Mr. Durst: I ask for a continuance.

The Referee: Article III of Chapter XII sets up the 'Jurisdiction, Powers, and Duties of the Court.' Section 411 of that Article provides that:

'Where not consistent with the provisions of this Chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.'

I find nothing in Article III specifically referring to the power of the Court to require assignees to turn over.

Now, Mr. Durst, this Court has been functioning here. This Referee, for 18 years and I do not recall another instance where the Court found it necessary to certify anybody for contempt proceedings, and it is with the deepest regret that this court experiences that situation in this case, because this Court is convinced that you seem to be laboring under a false impression here. You repeat and say over and over again that because of the assignment given you, you have no power to do anything with the property involved in the assignment except that given you in the assignment itself, and you don't seem to realize and understand the provisions of the Bankruptcy Act in a proper case terminate that power given you as Assignee for the Benefit of the Creditors, and requires him to do something else, namely, to deliver up possession to the person designated by the Bankruptcy Court. *The order of the Bankruptcy Court supersedes and nullifies the provisions of the Assignment with Reference to what the assignee should do with the property.* It is so simple that it doesn't even permit of argument. The Bankruptcy Act vests the Bankruptcy Court with authority to require an Assignee to do certain things; and after a hearing and an admission on your part that you had the status of

Assignee for the Benefit of Creditors under a general assignment, an order was made directing you to turn the property over to a designated trustee, and you have failed to do so, and there is nothing remaining for this court to do except certify you for contempt.

Mr. Durst: In that connection I move for a continuance of two weeks.

The Referee: The motion is denied.

Mr. Durst: Also, in that connection, to be permitted to offer here in this matter the Answer of the Assignee in the State Court action, which suit has been referred to in this proposed real property arrangement, that being Superior Court Action transferred to Los Angeles, entitled:

'In the Superior Court of the State of California, in and for the County of Los Angeles, No, TRANSFERRED TO LOS ANGELES, S.F.C. 914. ANSWER OF WALTER C. DURST.'

The Referee: Your offer is denied on the ground that it is entirely immaterial." (Emphasis added.)

APPENDIX "E."

District Court Opinion.

District Court [R. 200]:

"The Court: Just answer yes or no. Have you complied with Referee Brink's order to turnover? I don't want any argument. I want just an answer.

Have you complied with it or haven't you?

Mr. Durst: I hand to the clerk a letter dated November 29, 1954—

The Court: Please Mr. Durst, will you answer the question? I know you have legal objections, and we are going to protect them for you.

Mr. Durst: Thank you, your Honor, Yes, I have complied with it.

The Court: All right.

Mr. Siemon: May I ask—

Mr. Durst: I ask this document, which I have handed in, be spread upon this record in its entirety, a letter to your Honor delivering a deed, in accordance with the order, and that the contents, that the document itself be marked as an exhibit, Exhibit "O" and that the contents of the letter and of the deed be admitted in support of the objections to evidence warranting the finding of contempt.

District Court Opinion Continued.

[R. 209].

The Court: . . . I don't like to sign a judgment binding a faithful officer of the court in contempt."

APPENDIX "F."

JURISDICTION.

The jurisdiction of the Supreme Court of the United States is invoked under the provisions of Title 28 U. S. C., Section 1254, which reads in part:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case before or after rendition of judgment or decree; . . ."

Title 28 U. S. C., Sec. 2101:

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceedng before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

Bankruptcy Act, Sec. 24, 11 U. S. C., Sec. 47:

"§24. Jurisdiction of Appellate Courts. A. The Circuit Courts of Appeals of the United States and the United States Court of Appeals for the District of Columbia, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction from the several courts of bankruptcy

in their respective jurisdiction in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: *Provided, However,* that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury, shall extend to matters of law only; *Provided further,* That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the Appellate Court.

(b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal.

(c) The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

Bankruptcy Act, Sec. 416, 11 U. S. C., Sec. 416:

"Sec. 416. Where not inconsistent with the provisions of this chapter the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding."

5TH AMENDMENT TO THE CONSTITUTION.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual serv-

ice in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Bankruptcy Act, Sec. 2(a)(21), 11 U. S. C., Sec. 11 (a)(21):

> "(21) Requires receivers of trustees appointed in proceedings not under this act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act or, where an arrangement or a plan under this Act has been confirmed and such property has not prior thereto been delivered to a receiver or trustee appointed under this act, to deliver such property to the debtor or other persons entitled to such property according to the provisions of the arrangement or plan and in all such cases to account to the court for the disposition by them of the property of such bankrupt or debtor: *Provided Howevver,* That such delivery and accounting shall not be required except in proceedings under Chapters X and XII of this Act, if the receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date of bankruptcy. Upon such accounting, the court shall re-examine and determine the propriety and reasonableness of all disbursements made out of such Property by such receiver, trustee, assignee or agent,

either to himself or to others, for services and expenses under such receivership, trusteeship, assignment, or agency, and shall, unless such disbursements have been approved, upon notice to creditors and other parties in interest, by a court of competent jurisdiction prior to the proceeding under this Act surcharge such receiver, trustee, assignee, or agent the amount of any disbursement determined by the court to have been improper or excessive."

Bankruptcy Act, Sec. 25(b), 11 U. S. C., Sec. 48(b):

"Receiver and Trustees shall not be required in any case to give bond when they take appeals."

Bankruptcy Act, Secs. 401, 402 (in part), 11 U. S. C., ecs. 801, 802 (in part):

"Sec. 401. The provisions of this chapter shall apply exclusively to proceedings under this chapter.

"Section 401 (in part). The provisions of Chapter I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply to proceedings under this chapter. . . ."

Bankruptcy Act, Sec. 475, 11 U. S. C., Sec. 875:

"Section 475. The court may direct the debtor, his trustee, any mortgagees indenture trustee, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of the property dealt with by the arrangement which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the arrangement."

Bankruptcy Act, Sections 506, 507, 508 and 509, 11 U. S. C., §§906-909:

'Section 506. A petition may be filed under this chapter notwithstanding the pendency of a prior mortgage foreclosure, equity, or other proceedings in a court of the United States of any State in which a receiver or a trustee of all or any part of the property of a debtor has been appointed or for whose appointment an application has been made."

"Section 507. Such prior proceeding shall be stayed by the filing of a petition under this Chapter. The Trustee appointed under this chapter, upon his qualification, or if a debtor is continued in possession, the debtor shall become vested with the rights, if any, of such prior receiver or trustee in such property and with the right to the possession thereof. The Trustee or debtor in possession shall also have the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage."

"Section 508. The judge shall make such provisions as may be equitable for the protection of the obligations incurred by a receiver or trustee in such prior proceeding and for the payment of the reasonable compensation for services rendered and of the proper cost and expenses incurred therein as may be allowed by the judge."

"Section 509. Upon dismissal of a proceeding under this Chapter, such prior proceeding shall become reinstated and the judge shall allow the reasonable costs and expenses under this chapter, including the allowance provided for in Article XI of this

chapter, and shall make appropriate provision for the retransfer of such property to the person or persons entitled thereto upon such terms as may be equitable for the protection of the obligations incurred in the proceedings under this chapter by the trustee or debtor in possession, and for the payment of the costs and expenses of the proceedings."

Title 28, U. S. C., Sec. 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs neessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law.

"(b) An alternative writ of rule nisi may be issued by a justice or a judge of a court which has jurisdiction. As amended May 24, 1949, c. 139, §90, 63 Stat. 102."

Title 28 U. S. C., Sec. 1652:

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Federal Rules of Civil Proceedure, Rule 62. Stay of Proceedings to enforce a judgment.

"(f) Stay According to State Law. In any state in which a judgment is a lien upon the property of the judgment debtor and in which the judgment debtor is entitled to a stay of execution, a judgment debtor is entitled, in the district court held therein,

to such stay as would be accorded him had the action been maintained in the courts of the state."

California Civil Code, Section 870, which reads:

"Where a trust in relation to real property is expressed in the instrument creating the estate every transfer or other act of the trustees, in contravention of the trust is absolutely void."

California Civil Code, Section 1060, which reads in part:

'1. Any power, which is exercisable by deed, by will, by deed or will, or otherwise, whether general or special, *other than a power in trust which is imparative,* is releasable, . . ." (Emphasis added.)

California Civil Code, Section 2279, which reads:

"A trust is extinguished by the entire fulfillment of its object, or by such object becoming impossible or unlawful."

California Code of Civil Procedure, Section 389, which reads:

"The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed, and summons thereon to be issued and served. And when, in an Action for the recovery of real or

personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in by the proper amendment."

California Code of Civil Procedure, Section 944, which reads:

"If the judgment or order appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment or order cannot be stayed by the appeal until the instrument is executed and deposited with the Clerk with whom the judgment or order is entered to abide the judgment of the appellate court."

California Code of Civil Procedure, Section 946, which reads in part:

". . . and the court may in its discretion, dispense with or limit the security required by this chapter, when the appellant is an executor, administrator, trustee, or other person acting in another's right . . ."

APPENDIX "G."

In the United States Court of Appeals, for the Ninth Circuit.

In the Matter of the Estate of Mary Kalpakoff (District Court No. 60964-T), Debtor. No. 14655.

MOTION TO DISMISS APPEAL.

Comes now William Chernabaeff, the duly appointed, qualified and acting Trustee to the above entitled matter, by his undersigned attorney, and moves the above entitled Court to dismiss the appeal taken by Walter C. Durst, as assignee for the benefit of creditors of the above named debtor, which appeal was taken by notice of appeal to this Court filed on December 20, 1954, in the office of the Clerk of the United States District Court of the Southern District of California, Central Division, whereby said appellant purportedly appeals from the orders of said last mentioned Court dated November 22, 1954, November 29, 1954, December 6, 1954, and December 7, 1954, the last mentioned order as having been entered on December 9, 1954, on the ground that: (1) the order appealed from, to wit, the "Order Affirming the Turn-Over Order of the Referee" dated and filed Nov. 29, 1954, is the basic order as to which the other orders specified in the notice were special in a series of proceedings looking to the enforcement of the basic order in which series the Judgment Dismissing Contempt Proceeding entered December 9, 1954, was the final order; (2) the appellant complied with the basic order (which has been affirmed) as shown by the minutes of November 29, 1954, and by the last mentioned order to which appellant consented in open Court, which he thereby caused

to be given, and which was not an order or judgment by which he was aggrieved; (3) said appeal (or appeals) except as to the basic order are purported appeals from special orders after final judgment and are not final orders or judgments; (4) the questions raised by the appeal (or appeals) have become moot by reason of appellant's compliance with Referee's Turn-Over Order; and/or (5) two or more appeals on distinct matters are commingled and not separately stated.

Dated: May 10, 1955.

ALFRED SIEMON,
Alfred Siemon, Attorney for Trustee.

APPENDIX "H."

In the United States Court of Appeals, for the Ninth Circuit.

In the Matter of the Estates of Jack P. Kalpakoff (District Court No. 60963-T), Mary Kalpakoff (District Court No. 60964-T), Debtors. No. 14655.

MOTION TO REVERSE AND TO REMAND THE CAUSE WITH INSTRUCTIONS TO VACATE AND SET ASIDE ORDERS AND DISMISS FOR MOOTNESS.

Comes now the respondent-appellant, Walter C. Durst, a private trustee, as assignee for the benefit of creditors, appearing specially, for the purpose of preserving all his rights as a trustee, moves the Court for an order to reverse all orders on appeal herein and to remand the cause to the United States District Court and to the Referee in Bankruptcy with instructions to dismiss proceedings involved in said appeals, and vacate and set aside all orders dealing with the property described in the orders reversed and to dismiss all proceedings respecting same.

Said action will be made on the ground that the order dismissing the appeal herein establishes that the respondent-appellant has complied in every particular with the orders appealed from and same have become moot, and unsupported by the record herein where based upon orders which have become moot, and appellant's 32 points [R. 211] are each determined in appellant's favor and are *res adjudicata.*

Said motion will be based upon the affidavit of Walter C. Durst, appearing specially, and upon all the records and files herein, and all the proceedings had herein includ-

ing the motion to dismiss the appeals, and admissions by the debtors in their schedules in bankruptcy, as amended.

Wherefore, respondent-appellant, appearing specially, prays that an order be made and entered herein reversing the orders on appeal and remanding the cause to the District Court in Bankruptcy and the Referee in Bankruptcy, with instructions to dismiss said proceedings, and, further, to vacate and set aside all orders made by said courts or either of them which are involved in these appeals and looking to the enforcement or carrying out of said (*said*) orders so reversed or dealing with the property of the general assignment, and for such other and further order as may be meet and proper in the premises.

WALTER C. DURST,

Walter C. Durst, a Private Trustee Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially Respondent-Appellant.

MORRIS LAVINE,

Morris Lavine, Attorney for the Respondent-Appellant, a Private Trustee, Appearing Specially.

Served and mailed to Clerk of Court of Appeals August 15, 1955.

APPENDIX "I."

In the United States Court of Appeals, for the Ninth Circuit.

In the Matter of the Estate of Jack P. Kalpakoff (District Court No. 60963-T), Mary Kalpakoff (District Court No. 60964-T), Debtors. No. 14655.

NOTICE OF EXISTENCE OF CONSTITUTIONAL QUESTION IN APPEAL.

Comes now Walter C. Durst, a private trustee, as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, appearing specially, and, pursuant to Rule 35 of the Rules of the United States Court of Appeals for the Ninth Circuit, hereby gives notice that the Constitutionality of Bankruptcy Act, Sections 2(a)(21) as interpreted and applied in this case by the Bankruptcy Court is challenged herein by Appellant.

Dated this 7th day of September, 1955.

MORRIS LAVINE,

Morris Lavine, Attorney for the Respondent-Appellant, a Private Trustee, Appearing Specially.

APPENDIX "J."

United States District Court, Southern District of California, Central Division.

In the Matter of Jack P. Kalpakoff, Debtor No. 60,963-T Bkcy. Minutes of Court.

In the Matter of Mary Kalpakoff, Debtor, No. 60,964-T Bkcy. Date: Nov. 22, 1954, at Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge;

Deputy Clerk: Wm. A. White;

Reporter: Virginia Wright;

Counsel for Debtors: No appearance (Alfred Siemon);

Counsel for Assignee: Morris Lavine and Walter C. Durst.

Proceedings: For further hearing on motion of Assignee to expunge purported Reporter's transcripts of hearing before Referee, July 7 and 9, 1954, and order separate verbatim transcripts; and

For hearing motion to dismiss Citation for Contempt.

It Is Ordered that (1) motion of common-law assignee for an order setting aside the order of general reference in these cases is denied. The referee is instructed to proceed with all his lawful duties;

(2) Motion of common-law assignee for an order consolidating these two estates is denied without prejudice to such motion being renewed before the referee. The Court is of the opinion that the referee is so much more familiar with the problem of these two matters that such a motion should be decided by him. No showing has been made that the matter was ever presented to the Referee.

(3) Motion of the Assignee for an order approving the filing of one claim on behalf of the creditors is likewise denied without prejudice to such motion being renewed before the Referee.

(4) The Assignee has filed opposition to the debtors' proposed plan of arrangement, and proposed a new arrangement. The Court treats such filing and any hearing relating thereto as a motion by the Assignee for leave to file such opposition and proposal with the Court. Said motion is denied without prejudice to the filing of such opposition, and proposed new arrangement, with the Referee, if they have not been previously filed.

(5) The order of the Court appointing Morris Lavine as attorney for the Assignee is now ordered, and hereby is vacated as of this date.

(6) The order to show cause why the Assignee should not be held in contempt, the Court finds that the Assignee is in contempt of the order of the Referee and this matter is continued to Monday, Nov. 29, 1954, 10 A. M., to allow Assignee to purge himself of contempt.

(7) It is ordered that Assignee's motion for a restraining order to prevent interference with his management of the common-law assignment is denied.

It Is Ordered, in the light of the rulings made this date on various actions that have been pending in this matter, that it is unnecessary to enter any ruling in connection with the motions that are on the calendar today.

Attorney Durst moves the Court for leave to have "Assignee's objections to Referee's purported certificate filed July 7, 1954" and "Assignee's objections to Referee's purported certificate filed Aug. 17, 1954, and purported supplement thereto, filed Nov. 19, 1954" marked as exhibits.

It Is Ordered that said documents may be marked for identification and further, that they may be lodged with the Clerk. Assignee's Exhibits L and M are marked for identification.

It Is Further Ordered that all exhibits previously filed in this Court may be removed for filing with the Referee.

It Is Ordered that all exhibits previously filed in this Court may be removed for filing with the Referee.

It Is Ordered that Mr. Alfred Siemon, attorney for debtors, prepare and submit a formal order on the rulings made this date, and the clerk is further ordered to so advise Mr. Siemon.

EDMUND L. SMITH,
Clerk,

By WM. A. WHITE,
Deputy Clerk.

[Clerk's Certificate, p. 5A.]

APPENDIX "K."

"Deed," Exhibit "O," Also Protest.

The following is a copy of Exhibit "O" as conformed by the Clerk during the recess on November 29, 1954 [R. 200], the "Deed" portion and exhibit corrected, re-signed initialed by petitioner [R. 204], and re-notorized [R. 206]. (The correction, re-signing and re-notarization were conformed by petitioner October 26, 1955.)

Case No. 60963-T. Matter Jack Kalpakoff, Assignee, Exhibit O, Date 11-29-54.

Filed Clerk, U. S. District Court, Southern Dist. of California, Nov. 29, 1954, Wm. A. White, Deputy Clerk. Edmund L. Smith, Clerk, By Wm. A. White, Deputy Clerk, Nov. 29, 1954.

Honorable Ernest A. Tolin,
Judge of the United States District Court,
Second Floor Federal Building,
Los Angeles, California.

Re Jack P. Kalpakoff, Debtor, No. 60963-T, and Mary Kalpakoff, No. 60964-T.

Honorable Sir:

Reference is made to the order of the referee herein dated June 15, 1954, "Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in his Possession" in which proceedings the undersigned appeared specially and objected thereto, property effected is described in deed recorded in Book 31667, Page 86, Official Records, County of Los Angeles, State of California, in deed recorded in Book 1804, Page 146, Official Records, County of Kern, State of California, in Bill of

Sale recorded in Book 35500, Page 235, Official Records, County of Los Angeles, State of California, Crop Mortgage dated November 25, 1949, recorded in Book 31667, Page 78, Official Records, County of Los Angeles, State of California, and Crop Mortgage dated November 25, 1949, recorded in Book 2044, Page 425, Official Records, County of Kern, State of California.

Reference is also made to the fact that the undersigned took a review to the District Court of the said order of June 15, 1954.

Reference is also made to certificate of the referee filed July 7, 1954, "Certificate of Facts Showing Contempt in Proceedings Before Referee" in which proceedings the undersigned appeared specially and objected thereto.

Reference is also made to the minute order of the Honorable Ernest A. Tolin, United States District Judge, dated herein November 22, 1954, subdivision (6) wherein the court finds that the assignee is in contempt of the order of the referee and continuing the matter of such contempt to Monday, November 29, 1954, at 10:00 A. M. to allow the assignee to purge himself of such contempt.

Reference is also made to the fact that the aforesaid proceedings were had and done: (a) notwithstanding the non-existence of an order whereby an arrangement or plan under Chapter XII of the Bankruptcy Act has been confirmed as required by Section 2a (21) of the Bankruptcy Act; (b) notwithstanding that the referee under date of August 13, 7954, expressed to counsel, including the undersigned as follows:

". . . it has occurred to me that the order of June 15, 1954, may have been premature in the light of the

following extract from Section 2a (21) of the Bankruptcy Act:

> ". . . Require . . . assignees for the benefit of creditors . . . to deliver the property in their possession or under their control to the receiver or trustee appointed under this Act, or, *where an arrangement or a claim under this act has been confirmed* and such property has not prior thereto been delivered to a receiver or trustee appointed under this Act, to deliver such property to the debtor or other person entitled to such property according to the provisions of the arrangement or plan, and in all such cases to account to the court for the disposition . . . of the property of such bankrupt or debtors . . ."

(c) notwithstanding the pendency of an action against the undersigned in the State Court to which action all the creditors have been ordered to be made indispensable parties, and are so made parties, which action was commenced more than four months prior to bankruptcy, for the cancellation of the general assignment and the trust thereby evidenced, being Action No. Transferred to Los Angeles S.F.C. 914, in the Superior Court of Los Angeles; (d) notwithstanding that in their schedules the debtors set forth their interest as follows:

> ". . . Petitioner has an undivided one-half equitable interest as resulting *cestui que trust* of the Jack P. Kalpakoff and Mary Kalpakoff, General Assignment, created November 25, 1949, wherein Walter C. Durst is the assignee for the benefit of the creditors, in the lands described . . ."

(e) notwithstanding the non-existence of an order retaining the debtors in possession; (f) notwithstanding,

the failure to make parties to the proceeding from which said order of June 15, 1954, resulted the creditors for whose benefit the general assignment was made, and who, under applicable law are indispensable parties; (g) notwithstanding the common law general assignment made more than four months prior to bankruptcy; (h) notwithstanding the rights of the Assignee are adverse to the Trustee in Bankruptcy and not subject to summary jurisdictions by virtue of the aforesaid recorded documents and other documents; (i) notwithstanding the provisions of the California Civil Code and applicable law that except as to a bona fide purchaser for value the trust follows the land; (j) notwithstanding the pendency of said review of said order dated June 15, 1954.

There is attached to the original of this letter and delivered to the Honorable District Judge, a Deed, Satisfaction and Releases by Court Order, executed by the undersigned in favor of William Chernabaeff as Trustee in Bankruptcy herein subject to an exception upon each and all of the grounds urged in the District Court and the Referee's Court, during the entire proceeding, which are hereby incorporated by reference herein as though fully set forth, and the undersigned reserves the right to test each and all of these questions and matters on appeal. By executing and delivering said deed, satisfaction and releases by court order, as aforesaid, the undersigned does not admit that the referee had jurisdiction to make his order dated June 15, 1954. Neither does the assignee by such action relinquish the right, in all deference, to contest such jurisdiction or relinquish the right to appeal therefrom. The Court's attention is respectfully directed to the fact that no formal order of the United States District Court having been signed or filed up to

10:00 a. m., November 29, 1954, the undersigned is unable to appeal therefrom and yet is meanwhile required to purge himself from such alleged contempt. The undersigned accordingly, in all deference, continues to assert the rights of the creditors for whom he is acting as assignee for the benefit of creditors, to assert the rights of the Kalpakoffs' as resulting *cestui que trust* of the general assignments, and to assert the rights of the assignee.

It is respectfully requested that the original of this letter be made an exhibit in said proceeding to evidence the fact that the undersigned assignee while executing and delivering such deed, satisfaction and releases does so under protest and reserves all rights and of the creditors on whose behalf he is acting as such assignee, and of the resulting *cestui que trust* of the general assignment, and of himself as assignee including all rights to appeal from said order of the referee dated June 15, 1954, and to appeal from such order as may be made by the learned District Judge pursuant to the minute order herein dated November 22, 1954.

The undersigned assignee respectfully asks that his protest on the grounds herein above set forth be officially noted in the record in addition to making the original of this letter an exhibit herein.

WALTER C. DURST,

Walter C. Durst, Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff, Appearing Specially.

Exh. "O."

Filed Nov. 29, 1954. Edmund L. Smith, Clerk, by Wm. A. White, Deputy Clerk.

Deed, Satisfaction, Releases by Court Order. This instrument, made the 23rd day of November, 1954, by Walter C. Durst in his capacity as assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff by General Assignment dated November 25, 1949, wherein Jack P. Kalpakoff and Mary Kalpakoff are assignor, having acquired title by virtue of said general assignment and of certain deeds recorded in Book 31667, Page 86, in the official records, County of Los Angeles, State of California, and in Book 1804, Page 146, of Official Records, County of Kern, State of California, and by bill of sale recorded in Book 35500, Page 235, Official Records, County of Los Angeles, State of California, promissory note dated November 25, 1949, $95,000.00, wherein the payee is Walter C. Durst, Assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, crop mortgage dated November 25, 1949, recorded in Book 31667, Page 78 of Official Records, County of Los Angeles, State of California, and crop mortgage dated November 25, 1949, recorded in Book 2044, Page 425, Official Records, County of Kern, State of California, pursuant to order requiring and directing assignee for the benefit of creditors to deliver property in his possession, made and entered by the referee in bankruptcy June 15th, 1954, wherein the assignee appeared specially and objected thereto, and affirmed on review by the United States District Court, Southern District of California, Central Division, in the matter of Jack P. Kalpakoff, Debtor, being No. 60963-T, and in the matter of Mary Kalpakoff,

Debtor, being No. 60964-T, wherein the assignee appeared specially and objected thereto, does hereby transfer and convey unto William Chernabaeff, Trustee of the aforesaid estate of Jack P. Kalpakoff, and William Chernabaeff, Trustee of the estate aforesaid of Mary Kalpakoff, all of his right, title and interest so acquired as such assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff in and to the following described real and personal property:

1. Real Property.

PARCEL 1: The North half of the Northwest quarter of Section 24, Township 9 North, Range 14 West, Kern County, California, and also that piece of property described as the Northeast quarter of Section 23, Township 9 North, Range 14 West, Kern County, California, a total of 240 acres.

PARCEL 2: The Northwest quarter of Section 23, Township 7 North, Range 23 West, S. B. M., also that portion of the Northwest quarter of the Southeast quarter of Section .... [23 W.C.D.], Township 7 North, Range 13 West, S. B. M., described as follows: Beginning at the Northwest corner of said Southwest quarter; thence West along the North line of said Southeast quarter, 208 feet; thence South parallel with the West line of said Southeast quarter, 104 feet; thence West parallel with the North line of said Southeast quarter 208 feet to a point in the West line thereof; thence North along said West line, 104 feet to the point of beginning.

2. RANCH EQUIPMENT:

John Deere Disc; Model D John Deere Tractor No. 51391; No. 7 McCormick Deere Mower; Case Dump

Rake; Ford Tractor & Mower; Border Fordson Disc; John Deere Side Del Rake; McDermott Bale Loader, Model 44, Ser. 554; John Deere Gang Plow; Horse; Harness; John Deere Plow, 16" 2-way; John Deere Land Leveler; Case Baler; Oliver Baler; Truck; 1948 Ford Tractor No. 8N129697; Ford Tractor Air Cleaner, Dual Wheels; Nowner Scraper, Dearborn Model 19-5, Ser. No. 3998; 1942 Ford Truck; Fairbanks Morse Pump w/A.C. Motor, 1-120 gal. tank, pipe and misc. fittings, pumps and pumping equipment; 10 L. John Deere Killefer Hydraulic Landlever, Model AK, Ser. 0052; No. 300, Atlas Hydraulic Power Control Unit; Be-Ge Hydraulic Carrying Scraper Ser. #51008, with Be-Ge Pump and Dual Control Valve; LS400 John Deere Lindeman Landscraper, Ser. #0055; Allis Chalmers Tractor & Mower; Admiral Baler; Land Leveler home made; Power Saw, Campman, 7" wide, 1 H. P. Motor; Ferguson Scraper and Border Disc, 1945; Hay Wagon; Thomas Drill; Drill Best; Brick Scraper, Towner; Fresno Scraper; International Tractor, Engine #F.8.M.-1946, Ser. #TAG 4055, Model T-40 Crawler, w/Dozer Blade; Hay Wagon, 1948; 9 Heifers; 2 Bulls; 2 Cows; 60 Sheep, ewes; Tank & Pump.

Pursuant to said order does hereby execute this complete satisfaction of the promissory note dated November 25, 1949, in the amount of $95,000, wherein the payee is Walter C. Durst, assignee for the benefit of creditors of Jack P. Kalpakoff and Mary Kalpakoff, and does hereby release the mortgage of crops dated November 25, 1949, recorded in Book 31667, Page 78 of Official Records, County of Los Angeles, State of California, and does hereby release the mortgage of crops dated November 25, 1949, reorded in Book 2044, Page 425, Official Rec-

ords Kern County, State of California, subject to taxes, reservations and matters of record.

Dated November 29, 1954.

WALTER C. DURST,

Walter C. Durst, Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

State of California, County of Los Angeles—ss.

On November 29, 1954, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Walter C. Durst, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same, as such assignee. (W.C.D.)

Witness my hand and official seal.

(Seal) VERONA TAFT.

Notary Public in and for the said County and State.

Walter C. Durst, Assignee for the Benefit of Creditors of Jack P. Kalpakoff and Mary Kalpakoff.

Witness my hand and Official Seal this 29th day of November, 1954.

(Seal) LOUISE LELAND,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires Mar. 29, 1958.

LOUISE LELAND,

Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 29, 1958. 217J. Federal Bldg., 213 No. Spring St., Los Angeles 12, California.

APPENDIX "L."

United States District Court, Southern District of California, Central Division.

In the Matter of Jack P. Kalpakoff. No. 60,963-T, Bkcy. Minutes of the Court.

In the Matter of Mary Kalpakoff. No. 60,964-T, Bkcy.

Minutes of the Court.

Date: November 29, 1954.

At: Los Angeles, Calif.

Present: Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Virginia Wright; Counsel: Walter C. Durst, for Assignee; Counsel: Alfred Siemon, for Debtors.

PROCEEDINGS: For hearing: *Re* Assignee purging himself of Contempt Enter proceedings.

Assignee exb. 'N" marked for identification. Attorney Siemon presents proposed order adjudging Assignee in contempt. Court orders proposed order lodged. "Lodged proposed order." Court inquires of Assignee if he has complied with order of Referee to turn over certain properties. Mr. Durst replies that he has. Mr. Durst moves for leave to file and have marked as an exhibit "Letter dated 11/29/54 to Judge Tolin and "Deed, Satisfaction, Releases by Court Order."

Assignee's exb. "O" is marked for identification.

Enter order that further hearing in this matter is continued to 3:30 P. M. this date.

At 3:35 P. M., entered further proceedings. Court inquires if attorney for Debtors has looked over what

Assignee has presented as compliance with order of Referee in re contempt. In open court Deed, Satisfaction and Release is corrected and acknowledged, by Assignee.

IT IS ORDERED that attorney for Debtor prepare and submit order re: dismissal of contempt. It is further ordered that Deed may be withdrawn by Mr. Siemon for purposes of recordation.

EDMUND L. SMITH, Clerk.

By ———————— Deputy Clerk

[Clerk's Certificate S. E.]

APPENDIX "M."

Statement of the Case on the Merits.

The case involves the construction of Bankruptcy Act, Section 2(a)(21), as to an "assignee for the benefit of creditors" and "assignments" under Chapter XII, for the first time since it has been amended by the Chandler Act of 1938, and interpreted by the Referee in bankruptcy as deleting the provisions of the four month limitation. The common law general assignment [R. 14-17] here involved was created November 25, 1949, by recordation thereof and of deeds, bill of sale, and crop mortgages [Ex. "E," pp. 11-24]. No common law general assignment case appears in the reports since the 1934 amendments of the Bankruptcy Act, which apparently dealt with some of the aspects of the four month period of limitation. The creditors were pressing heavily. The Franzier-Lempke Act had expired.

Petitioner commencing in 1922 has served as receiver and trustee in Los Angeles during which year he was secretary to the then District Judge Oscar A. Trippet, now deceased. Petitioner was called into the case by P. M. Schwabacher the attorney for the Kalpakoffs [Ex. "F," pp. 1-4, line 18 thereof]. The debtors in 1949 owned two ranches and other property. They were heavily pressed by indebtedness, and both ranches were under default and in danger of foreclosure. Documents signed by the Kalpakoffs were approved by P. M. Schwabacher their attorney [Ex. "E,", pp. 8, 9, 10]. On November 25, 1949, the owners of the ranches made a common law general assignment for the benefit of their creditors under State law and State practice in California [R. 14-17]. Their only interest in the two ranches after the expiration of the four month period was, and is, as resulting *cestui*

que trust, entitled to the surplus, if any, after creditors the real parties in interest, were paid 100 cents on the dollar, if possible. The assignee in three years' time by operation of the Los Angeles County ranch, lease of the Kern County ranch, sale of city property, and sale of personal property was able to cure ranch lienholder defaults by December 1, 1952 [R. 51, 52]. In 1952 the debtors prevented a $75,000 cash sale of the Kern County ranch and said sale was lost [Ex. "E," pp. 204-205]. The operating alfalfa beds on the Los Angeles County ranch were so depleted that the assignee ceased to "deem it proper" to continue operations. In 1953 creditors, the real parties in interest, demanded payment and the assignee sought to sell a ranch or ranches for payment to the creditors of 100 cents on the dollar, if possible the surplus, if any, to the assignor as resulting *cestui que trust* of the general assignment. On April 23, 1953, the assignor brought suit in the State Court to vacate transfers, for appointment of Receiver and for general equitable relief in which suit all creditors were ordered made indispensable party defendants. A sale of the Kern County ranch for $70,000 [Ex. "E," pp. 242-245] was interfered with with by *lis pendens* filed [Ex. "E," p. 222]. The lienholder creditors on both ranches came into default and foreclosures were started.

The debtors to avoid foreclosures, April 28, 1954, filed their original Chapter XII Proceedings under the Federal Bankruptcy Act, wherein they agreed to pay creditors 100 cents on the dollar, from the operation or sale of a ranch or ranches [R. 6] and scheduled their only interest in the general assignment as resulting *cestui que trust* thereof [R. 8]. The foreclosures were restrained [Ex. "H"]. The debtors signed their names to documents to

carry out the $70,000 sale aforesaid [Ex. "E," pp. 242-245].

On May 26, 1954, the debtors amended their petition, and schedules [R. 9] wherein they also set forth their only interest as resulting *cestui que trust* of the general assignment [R. 9, 10] and elected the primary jurisdiction of the aforesaid State Court [Ex. "I," Sheet 3, proposed Real property arrangement]. No plan or arrangement has been confirmed herein.

On June 2, 1954 inconsistently with such election of the primary jurisdiction under State law and of the State Court, the debtors brought summary proceedings [R. 11-20] in which indispensable creditors were not named respondents in the Bankruptcy Court against the assignee for turnover of the assets of the general assignment.

The assignee appeared specially [R. 92] challenged jurisdiction [R. 20, 21, 22] asserted adverse claim, prior pending plenary State Court equity suit, omissions of indispensable party creditors of the general assignment as respondents [R. 92-107].

Turnover and accounting were ordered June 15, 1954 [R. 22-26]. Stay was denied [R. 26-30]. Petition for review [R. 30-35] was filed, thereafter the trustee in bankruptcy, a marriage and blood relation of the debtors [R. 99], brought proceedings to enforce turnover [R. 112-125], at which the assignee, appeared specially [Ex. "K"], challenged the jurisdiction, alleged want of equity [R. 166-167; see R. 131, 132] respecting offer of proof, filed accounting [Exs. "A," "B," "C," "D," and "E"] and was certified to the District Court [R. 35-38], appeared specially [R. 44-67], objected to jurisdiction [R. 71-73; Ex. "F"] moved to dismiss citation for contempt [R. 133-134], objected to certificates [R. 184, 186-188, 190; Exs. "L" and "M"; R. 196-199], the District Court affirmed

the referee in all particulars [R. 186], denied injunction, and restraining order, and affirmed denial of stay [R. 134-138, 186], and made a finding of contempt. The assignee under threat of punishment for contempt deposited the conveyance ordered with the Clerk of the District Court to abide judgment of the appellate courts [R. 200; Ex. "O"]. The aforesaid accounting and conveyances deposited constitute full compliance with the aforesaid turnover order of June 15, 1954. No attack has ever been made on either the accounting or the conveyance, or that petitioner has not administered his trust impartially, fairly and accurately. The District Court ordered "deed" released to Mr. Siemon for purpose of recordation (Appx. "L"). All the orders of the District Court were appealed [R. 140-141].

The trustee in Bankruptcy proceeded with the notice of sale of assets included in the aforesaid conveyance, resulting in a second petition for review, and a second appeal, a third petition for review, and a fourth petition for review of order confirming sale ripened into a third appeal.[1]

A petition for review of the Referee's order of January 12, 1955, authorizing sale of assets of the general assignment included in appeal No. 14655, was affirmed by the District Court, and the second appeal was filed April 28, 1955. On September 8, 1955 a third appeal was filed being No. 14907, from orders of the District Court affirming the referee's orders including order approving sale of assets of the general assignment included in appeal No. 14655. Said appeals are pending.

---

[1]Each of these petitions for review and appeals become necessary to preserve the *status quo* of the litigation, to avoid waiver, and to assert that under California Law the "Deed" is absolutely void as being in contravention of the trust, and the application of 28 U. S. C. 1652.

APPENDIX "N."

In the event the Court determines that the Court of Appeals erred, an exercise of the Court's power of supervision appears proper as follows:

The trustee in bankruptcy a marriage and blood relative of the debtors [R. 99] is a successor resulting *cestui que trust* purportedly in possession alleged to be tortious.

Galbraith v. Kline, 7 F. 2d 682, 684;

Kohn v. Ryan, 31 Fed. 636, 638;

Re Matter of Carroll, 274 N. Y. 288, 298, 8 N. E. 2d 864, 866, 867;

Bouvier, 1934, p. 159, *"Cestui que trust* . . . has no legal title to the estate, as he is merely a tenant at will if he occupies the estate." (Cites cases.)

The petitioner, as assignee for the benefit of creditors is entitled to the presumption of good faith.

Neel v. Barnard, 24 Cal. 2d 406, 421.

The turnover order requiring conveyance makes no provision that the trust created by the general assignment follows the land, or that the trustee in bankruptcy shall execute the object of the trust.

Cal. Civ. Code, Secs. 870, 1060, 2279;

Horne v. Title Insurance & Trust Co., 79 Fed. Supp. 91, 95.

The turnover order makes no provision in the event of reversal thereof, or for judgment either way in the prior pending plenary State Court equity suit [Ex. "E", pp. 223-235], or for the rights of interested parties to be reinstated, upon no plan or arrangement being confirmed.

Bankruptcy Act, Sec. 509 (11 U. S. C., Sec. 909).

The turnover order [R. 22], of the bankruptcy court apparently supersedes and nullifies [R. 123], the following leading general assignment cases:

Brainard v. Fitzgerald, 3 Cal. 2d 157, 163;

Forbes v. Scannell, 13 Cal. 242, 278, 285, 287 and 288;

McPherson v. Parker, 30 Cal. 455, 457 (Cited in *Mitaw v. Rodden,* 149 Cal. 1, 7, and *Lake v. Dowd,* 207 Cal. 290, 293.)

The turnover order [R. 22] is without regard to the primary jurisdiction of the prior pending plenary State Court equity suit, as to which the debtors made an election in their amended schedules and their proposed Real Property Arrangement [Ex. "I", Sheet 3]. The turnover order [R. 22] apparently supersedes and nullifies [R. 123] the following cases in this respect:

Chittenden v. Brewster, 69 U. S. 191, 196, 17 L. Ed. 839;

Ponzi v. Fessenden, 258 U. S. 254, 259, 66 L. Ed. 607;

Sharp v. Bonham, 213 Fed. 660, 668.

The turnover order [R. 22] apparently supersedes and nullifies [R. 123] Title 28, Section 1652, and *Erie R. Co. v. Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, that State Law governs rights, which are preserved in bankruptcy though remedies may be changed.

In re De Tamble, 88 F. 2d 893, 895.

The bankruptcy court has no power to enlarge the debtor's interest as same existed at the date of bankruptcy.

Callaway v. Benton, 336 U. S. 132, 93 L. Ed. 553.

The turnover order [R. 22] of the bankruptcy court supersedes and nullifies [R. 123] the leading case on the interpretation of Bankruptcy Act, Sec. 2(a)(21), *Emil v. Hanley,* 318 U. S. 515, 87 L. Ed. 954, and *Emil v. Hanley,* 130 F. 2d 369, 373, in the dissent is cited the *Matter of Greyling Realty Corp.,* 74 F. 2d 734, 737, as an example of a state court receivership being superseded because the issue of fraud therein set forth was avoided by the parties and could ". . . not be determined in the court of primary jurisdiction . . ." The issue of fraud is raised and can be determined in the prior pending plenary State Court equity suit. [See answer of defendant Walter C. Durst, Ex. "E", pp. 223-235 thereof.] (See, also, *Harrison v. Chamberlain,* 271 U. S. 191, 70 L. Ed. 897.)

The turnover order apparently supersedes and nullifies [R. 123] summary jurisdiction cases:

Cline v. Kaplan, 323 U. S. 97, 89 L. Ed. 97;

Louisville Trust Co. v. Commingor, 184, U. S. 18, 46 L. Ed. 413;

Galbraith v. Vallely, 256 U. S. 46, 49, 65 L. Ed. 823.

The turnover apparently supersedes and nullifies [R. 123] California law that requires creditors indispensable parties to be made respondents.

Cal. Code Civ. Proc., Sec. 389;

Lake v. Dowd, 207 Cal. 290;

Mitau v. Rodden, 149 Cal. 1.

See also:

Wagnon v. Pease, 104 Ga. 417, 429.

APPENDIX "O."

Orders to Be Reversed.

1. Order Refusing to Recognize Prior Jurisdiction of Prior Pending State Court Suit No. Transferred to Los Angeles 914, Superior Court of the State of California in and for the County of Los Angeles [R. 95, 123].

2. Order Refusing to Make Creditors Indispensable Parties Respondent to Turnover Proceedings [R. 106].

3. Order Requiring and Directing Assignee for the Benefit of Creditors to Deliver Property in His Possession [R. 22].

4. Order Denying Petition for Order Staying the Execution of the Order of June 15, 1954, Respecting Conveyances and Releases With Order [R. 26].

5. Certificate of Referee and Order to Show Cause *Re* Contempt dated July 7, 1954 [R. 35, 37].

6. The ruling of the United States District Court that ". . . the common law assignee is found to be in contempt" [R. 186].

7. The ruling of the United States District Court that, "Everything which has come here on the Certificate from the Referee, the Referee is affirmed as to all questions . . ." [R. 186].

8. Order of District Judge on Petition for Review of Referee's Order [R. 134].

9. Order denying motion for order setting aside order of general reference [R. 184].

10. Order denying "assignee's motion for restraining order to prevent interference with his management of the common law assignment" [R. 186].

11. Order vacating appointment of Counsel for Assignee [R. 135].

12. Order on Motions and Application of Assignee [R. 136].

13. Order dismissing Contempt Proceedings [R. 138].

14. "It is further ordered "Deed" be released to Mr. Siemon for purposes of recordation" United States District Court Clerk's docket entry November 29, 1954. [See record pertaining to second appeal, not printed, being the Second Supplemental Transcript of Record by the Clerk at pages 384 and 392 thereof.] [Clk. Cert. p. 5a.]

15. Order directing sale of real estate free from liens [Supp. Tr. of the Clk., U. S. Dist. Ct., not printed, Ct. of Ap. No. ....., pp. 299, 300 and 301 thereof].

16. Order Appointing Appraiser [Supp. Tr. of the Clk., U. S. Dist. Ct., not printed, p. 308 thereof].

17. Order of the Referee in Bankruptcy appearing on page 4 of Petition for Review of Referee's Orders of January 12, 1955, and December 10, 1954 [Supp. Tr. of the Clk., U. S. Dist. Ct., not printed, lines 26 to 32 of p. 305 thereof].

18. Order on Petition for Authority to Mortgage, filed March 2, 1955 [Dist. Ct. Clk. No. p. 17].

19. Orders Approving Sale of Real Estate, filed March 11, 1955 [Dist. Ct. Clk. No. p. 17].

20. Order denying Request for additional Documents in Connection with Referee's Certificate on Review filed February 7, 1955 [Supp. Tr. of Clk. of U. S. Dist. Ct., not printed, pp. 322 and 323 thereof].

21. All orders of the District Court and Referee in Bankruptcy effecting the *res* of the general assignment.

RECEIVED
NOV 29 1955
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 258 & 498

IN THE MATTER OF THE ESTATES OF JACK P. KALPAKOFF AND MARY KALPAKOFF, DEBTORS.

MOTION FOR LEAVE TO FILE OPPOSITION IN NO. 258 AND FOR LEAVE TO FILE IN FORMA PAUPERIS

Respondent moves for leave to file his opposition in Proceeding No. 258, and as ground therefor shows as follows: The Petition in No. 258 was filed July 23, 1955. Subsequently, on August 8, 1955, the Circuit Court dismissed the case before it for mootness, and thereafter the petitioner here filed a motion to reverse and remand the order of dismissal. This motion was denied by the Circuit Court on November 2, 1955. Petitioner filed a second petition for certiorari on October 31, 1955 and gave it the same number, 258, as the previous petition, apparently because the subject matter is largely the same as the subject matter of the first petition. The second petition has been renumbered as No. 498 in this Court. Respondent did not file an opposition in No. 258 because of the continued proceedings before the Circuit Court, and now requests leave to file a joint opposition in No. 258 and No. 498.

Respondent also moves for leave to file his opposition in forma pauperis, on the ground of the facts set forth in the attached affidavit.

Respectfully submitted,

/s/ Philip F. Herrick

Philip F. Herrick
1001 Fifteenth Street, N. W.
Washington 5, D. C.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Motion and of the attached Affidavit by Air Mail, postage prepaid, to Morris Lavine, Esquire, Bartlett Building, Los Angeles, California, this 28th day of November, 1955.

/s/ Philip F. Herrick
1001 Fifteenth Street, N. W.
Washington 5, D. C.
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of the foregoing Motion and of the attached Affidavit, Air Mail, postage prepaid, to Morris Lavine, Esquire, Bartlett Building, Los Angeles, California, this 29th day of November, 1955.

/s/ Philip F. Herrick
Philip F. Herrick
1001 Fifteenth Street, N. W.
Washington 5, D. C.
Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 258 & 498

IN THE MATTER OF THE ESTATES OF JACK P. KALPAKOFF AND MARY KALPAKOFF, DEBTORS.

AFFIDAVIT FOR LEAVE TO DEFEND IN FORMA PAUPERIS

UNITED STATES OF AMERICA
State of California } ss.
County of Kern

William Chernabaeff, being duly sworn, deposes and says:

1. I am a citizen of the United States and the duly appointed, qualified and acting Trustee in the bankruptcy proceedings more particularly designated and referred to in the petitions herein.

2. I am desirous of opposing the petitions for writ of certiorari in the above entitled and numbered matters.

3. I believe that I am entitled to oppose the granting of such writs and to an order of this court denying the petitions.

4. The nature of the petitions is for a writ of certiorari to the Circuit Court of Appeals of the United States for the Ninth Circuit to review orders made in such bankruptcy proceedings and particularly an order of said court made August 1st, 1955, dismissing the appeal of petitioner from an order of the District Court of the United States in and for the Southern District of California.

5. Because of the poverty of the estates of which I am Trustee, I am unable to pay costs in connection with my opposition;

that said estates are in distress due to my inability to convert any of the assets into cash on account of appeals, dilatory proceedings and particularly on account of these petitions filed by petitioner Walter C. Durst. I have no funds in my hands which are not subject to prior expenses of administration, with which to pay any fees which may have accrued herein.

6. There is no person interested in the estates or otherwise who is obligated to pay or secure costs or who is entitled to share in the proceeds of administration other than your affiant.

7. This affidavit is made for the purpose of availing myself of the rights and privileges in such case provided by Section 1915 of Title 28 of the United States Code; and is made upon the additional ground that I am the duly appointed, qualified and acting officer of the court in the administration of said estates.

WHEREFORE, deponent prays that he may have leave to oppose the granting of said writs in forma pauperis pursuant to said statute and pursuant to his official capacity in said bankruptcy proceedings.

William Chernabeff
William Chernabeff

Subscribed and sworn to before
me this 23rd day of November, 1955.

Bennett Simson (seal)
Notary Public in and for the
County of Kern, State of California.

WILLIAM CHERNABAEFF, the above affiant hereby consents that any proceeds in said estates, to such amount as the court may direct, will and shall be paid to the Clerk of this Court, who may therefrom pay all unpaid fees and costs, if any, taxed against me as respondent on said proceedings, and may pay to my attorney the amount which the Court allows or approves as compensation for the services of my said attorney.

Dated: November 23, 1955

William Chernabeff
William Chernabeff

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 258 & 498

IN THE MATTER OF THE ESTATES OF JACK P. KALPAKOFF AND MARY KALPAKOFF, DEBTORS.

OPPOSITION OF TRUSTEE IN BANKRUPTCY TO PETITION OF WALTER G. DURST FOR WRIT OF CERTIORARI

FOREWORD.

In No. 258 the petition sought review of an order of the Circuit Court of Appeals for the Ninth District denying stay of mandate and dismissing the appeal for mootness, and an order denying stay of proceedings pending appeal. It is believed the order denying the stay merged in the subsequent dismissal of the appeal. A subsequent petition has been filed to review the same identical order (order of Feb. 23, 1955) denying stay sought to be reviewed in the former petition. This subsequent petition is No. 498, and is limited to a review of the order of Feb. 23, 1955. On October 18th, 1955, Mr. Justice Douglas denied an application for an extension of time and a stay pendente lite. Hence, it appears that a review of the order of dismissal is the only matter now before the Court, and that such question is confined to No. 258.

We will, therefore, not discuss herein the extended argument of petitioner in support of his contention that he was entitled to a stay without bond.

REPLY TO APPELLANT'S STATEMENT OF QUESTIONS PRESENTED.

The statement of 19 questions in No. 258 and 6 in No. 498

may be summarized in a single question, as they are all corollaries of the main question, which is:

Did compliance by appellant with the turn-over order in the contempt proceeding, in order to purge himself of contempt, render the questions of the power of the court and regularity of the proceedings moot questions on the appeal?

STATEMENT OF BASIC FACTS.

Assignee was an assignee for benefit of creditors under a common-law assignment made more than four months prior to filing the petitions under Chapter XII of the Act. He was therefore within the express provisions of Sec. 2a(21) which gives the court power to compel a turn-over regardless of whether the assignment was made within four months prior to filing the petitions.

A transcript on the appeal to the Ninth Circuit Court of Appeals was prepared, and we believe is before the court. It appears therein that the turn-over order was made June 15, 1954 (pp. 22-26); that petitions for review by the District Court were filed and denied; that a hearing on contempt proceedings initiated to compel compliance with the order was had Nov. 29, 1954; that an order of the District Court dismissing contempt proceedings was made on Dec. 7, 1954, on the ground that appellant had on the date thereof in open court purged himself of contempt by compliance with the order. For some reason, this order is not set forth in either petition now before the court, although the court records and minute orders at the hearing on Nov. 29th, 1954 are referred to (see pp. 7, 21-34 of appendix, case 258). The order from which the appeal is taken is the "Order Dismissing Contempt Proceedings", made Dec. 7, 1954, and is found on pages 138-139 of the transcript on appeal to the Circuit Court. This was an order in favor of appellant procured by his action in complying. Appellant lodged a long letter of protest (App. K, in No. 258), which was nothing more than a summary of legal objections which he had already made

and argued. It is stated therein (p. 27-28) that at the time of the delivery of the deed (Nov. 29, 1954) no order adjudging him guilty of contempt had been made, and that "the undersigned is unable to appeal therefrom and yet in the meanwhile is required to purge himself from such alleged contempt." The appeal was not taken until Dec. 20, 1954. No copy is set forth in either of these proceedings, but will be found at p. 140 of the transcript on appeal to the Circuit Court. It appeals from several intermediate orders, including minute orders commencing with Nov. 22, 1954 and including the minute order of Nov. 29, 1954. Such matters will be discussed later herein at greater length.

QUESTIONS AS TO THE TURN-OVER ORDER ARE MOOT.

There was full compliance. See Order Dismissing Contempt Proceedings, dated December 7, as entered December 9, 1955.

The court made the order dismissing the contempt proceedings upon the ground of compliance with the turn-over order. In such cases an appeal from the order is on a moot question. See Henderson vs. Frank, 131 Fed. 2nd 484 (per Curiam); Taylor vs. Austrian, 154 Fed. 2nd 107, 108; St. Pierre vs. U. S., 319 U. S. 41, 42-43, 87 L. Ed. 1199, 1201; Cyc. of Fed. Procedure, Secs. 63.82, 63.88, 68.21 and 68.22.

Sec. 63.88 of the text last cited is:

> "Execution of a judgment leaving nothing on which the appeal can operate leaves the appeal subject to dismissal, and, similarly, appeal from mandamus will be dismissed when obedience has been rendered and respondents are out of office. If the judgment has been satisfied by compliance with its terms, although done under a sense of coercion to save the party's interest, the case is none the less moot. Generally, if there is nothing left but a question of costs, the appeal will be dismissed."
>
> (Our italics.)

The text cites Am. Book Co. vs. State of Kansas, 193 U. S. 49, 48 L. Ed. 613, which in turn cites and quotes from Mills vs. Green, 159 U. S. 651, 40 L. Ed. 293, where cases are accumulated and stated. In the Am. Book Co. case, it is said:

"It makes no difference that plaintiff in error 'felt coerced' into compliance. A judgment necessarily has a coercive effect, and necessarily presents to the party against whom it is rendered the consideration whether it is better to comply or continue the litigation. After compliance there is nothing to litigate."

Id.--Some Cases in Bankruptcy.

In Fisher vs. Cushman, 103 F. 860, the appeal was from a turn-over order after compliance (read at bottom of p. 867).

Reference is made to the Circuit Court's decision in Stevenot vs. Norberg, 210 F. 2nd 615, 617, where compliance was partial, leaving the main question at issue; and Andersen-Cottonwood Irr. Dist. v. Mason, 135 F. 2nd 112, where a complete compliance was made and the question of power to order compliance was rendered moot.

Where time within which to repurchase was fixed, an appeal was taken, and time expired before appeal was heard, the appeal became moot. In re. Meshberger, 131 F. 2nd 287, 288. As to redemption within time allowed therefor rendering question of right to redeem moot see Paradise etc. Co. vs. Fed. L. Bank, 147 F. 2nd 594, 596.

See Remington, 5th Ed., Sec. 3813, and Supp., for what appears to be a more or less comprehensive statement and accumulation of authorities, showing distinctions.

One of the distinctions appears to be that where compliance is voluntarily made, though coerced by the order, an appeal becomes moot.

There can be no question, we think, but that an appeal might have been prosecuted from the order affirming the turn-over order without compliance by obtaining a stay on furnishing bond. A stay bond would have suspended the order affirming the Referee's order, and relieved appellant of the coercive effect of the contempt proceeding. Compliance, therefore, was entirely voluntary.

APPEAL FROM ORDER OF DECEMBER 7TH, 1954.

This is the order dismissing the contempt proceeding by

reason of compliance. It adjudges that

> "said Durst having thus purged himself of contempt in the disobedience of said order, this contempt proceeding is hereby dismissed and said Durst is hereby fully exonerated."

That cannot possibly be an order by which appellant was aggrieved. He, in effect, procured the order. We think it requires the citation of no authorities on the proposition that one may not question a judgment made in his favor. However, see 2 Am. Jur. p. 943, App. and Error, Sec. 152.

Is appellant presumed to be objecting because he was not punished in contempt?

THE COURT HAS JURISDICTION TO COMPEL THE TURN-OVER.

The court has express powers in all bankruptcy matters to compel assignees for the benefit of creditors to deliver property in their possession to the bankruptcy trustee, or court receiver. Sec. 2a(21). There are no qualifications or limitations in the statute:--its powers are not limited to cases where the bankrupt may have an interest in or a title to the property, or affected or limited by the title the assignee may have. The terms of the statute are absolute and comprehensive:--it applies to all varieties of holdings for the benefit of creditors by agents, trustees, or receivers appointed in proceedings other than in bankruptcy. There is no requirement or condition that a proceeding in bankruptcy must have been pending when the assignment was made. In ordinary bankruptcy proceedings the power is denied unless exercised within four months of the assignment or appointment; but in Chapter XII proceedings there is no such limitation. Collier, 14th Ed., Vol. 1, pages 347-350, states:

> "Upon the filing of the petition, the assignee is deemed to be holding the bankrupt's property as the bankrupt's agent, and upon the qualification of the trustee, the latter does not take title as the successor of the assignee but as the successor of the bankrupt. The assignee cannot be said to hold as an adverse claimant and thus deny the summary power of the court. Only where the assignment is partial, not general, may such assignee be entitled to a plenary suit as an adverse claimant. . . .

"In addition, the terms of clause (21) provide that the four-month period shall not apply to proceedings under Chapter X (corporate reorganizations) and Chapter XII (real property arrangements), because in these proceedings a prior receivership or trusteeship is superseded irrespective of the time of appointment.

(Our emphasis.)

(The text is, of course, supported by many decisions of Federal courts cited in the foot-notes, and the latest Cumulative Supplement shows no cases to the contrary.)

The matter above quoted is preceded (pp. 342-347) by a discussion of the nature of such agencies wherein it is pointed out that the terms of the statute include "assignees for the benefit of creditors and agents authorized to take possession of or to liquidate a person's property," that it appears to refer to the assignee designated in a general assignment for the benefit of creditors; and the text quotes authorities stating that

'"A trustee in bankruptcy who has been appointed within four months of a general assignment made by a debtor for the benefit of his creditors has a right to obtain an order from the bankruptcy court, and in a summary proceeding, compelling the assignee to submit his accounts and to turn over to him all money and property in his hands which belonged to his assignor. No plenary suit is necessary in a case of that sort. The assignee under such conditions is not an adverse claimant, but merely the agent of the assignor for the distribution of the proceeds of the property, and as such agent his possession is that of the principal. He is a mere naked bailee for the creditors and has no right to retain the possession as against the trustee in bankruptcy . . ."

(Our emphasis.)

The text then states that such general assignments are not illegal, or fraudulent per se, and may be completely honest and sincere. We may assume, we think, that the text is amply supported by the cases cited in the foot-notes; and an examination of the notes will show that the text has not even been questioned.

It may be superfluous to add that the power of Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United States" is granted by the United States Constitution; and that when Congress enacts a statute vesting

courts in bankruptcy with broad, comprehensive express powers to require persons occupying specified relations to turn over property to the court it is presumed to mean what it says. Acting within the limits of the Constitution, the Federal government is supreme. U. S. Nat. Bk. vs. Pamp, 77 Fed. (2d) 9, 99 A.L.R. 1370. The power is not to be limited or conditioned on the nature of the title in either debtor or trustee by which the property may be held, whether absolute or qualified, or by whatever technical name may be employed to describe it:--the sole consideration of the statute is the purpose for which the property is held. If it be held for the benefit of creditors, the basis of jurisdiction is fulfilled.

Id.--Construction of Sec. 2a(21).

If there were any room for construction of the statute giving the court power to require the assignee to turn over the property he holds, that construction would have to be in favor of the power. Where the law deals with property rights which are regulated by state law, the Federal courts will follow the state courts; but when the language of Congress indicates a policy requiring a broader construction of the statute than state decisions would give it, federal courts cannot be concluded by state decisions. Board of Trade vs. Johnson, 264 U.S. 1, 68 L. Ed. 533. Federal law, not state law, applies in the interpretation of the bankruptcy act; and it is for the bankruptcy court to determine, by reference to the provision of the bankruptcy law, what rights created by the state law--regardless of the characterization which may be applied to them by state statutes and decisions--are within the jurisdiction of the bankruptcy court. Wragg vs. Fed. L. Bank, 317 U. S. 325, 87 L. Ed. 300. The Act is superior to all state laws on the subject; and the supreme power of congress may be exercised to exclude every competing and conflicting proceeding in state or federal court. 6 Am. Jur. p. 556. Where a right is

clearly given by the Act, it is not for the court to impose conditions limiting or restricting the obvious purport of the statute. Shopshire, W. and Co. vs. Bush, 204 U. S. 186, 51 L. Ed. 436. The provisions of the Act must be construed liberally to secure the objects for which it was created, rather than a narrow or technical construction, which would defeat its objects. Rem. on Bankruptcy, Sec. 25; 8 C.J.S. 418, Sec. 9; 6 Am. Jur. 522-529. In the pending matters, it is clearly essential that the assignee be required to turn over the property to the trustee if there is to be any administration of the affairs of the debtors.

We may, perhaps, pass the question of jurisdiction and power as expressly conferred by Sec. 2a(21) by the following reference to Collier's Bankruptcy. Collier, 14th Ed. Vol. 9, pp. 424-425. We submit that the author's discussion of the court's powers conclusively disposes of assignee's objections; and that it would be useless and superfluous for us to undertake to show that the author's conclusions are supported by the cases cited in the footnotes. The pertinent portion of the text is as follows:

> "The third sentence of §507 gives the trustee appointed under Chapter XII or the debtor in possession 'the right to immediate possession of all real property and chattels real of the debtor in the possession of a trustee under a trust deed or a mortgagee under a mortgage.' The latter provision has no relationship to the pendency of a prior court proceeding. It is not material under §507 when the prior receiver or trustee, or the trustee under a trust deed or the mortgagee under a mortgage, obtained his possession of the property. Both the second and third sentences of §507 should be viewed with §2a(21), under which the Chapter XII trustee or the debtor in possession may obtain property of the debtor which might not be obtainable under §507. Under §2a(21), the bankruptcy court has power, among other things, to require receivers and trustees appointed in proceedings not under the Bankruptcy Act, assignees for the benefit of creditors, and agents authorized to take possession of or to liquidate a person's property to deliver the property in their possession or under their control to the trustee appointed under Chapter XII or to the debtor in possession. Such delivery can be required in proceedings under Chapter XII and under Chapter X, though not in other proceedings under the Act, even though the non-bankruptcy receiver or trustee was appointed, the assignment was made, or the agent was authorized more than four months prior to the date the proceeding under the Act was commenced."

PETITIONER'S POINTS AND AUTHORITIES.

Many points are made, and a great number of authorities are cited. We do not feel obligated to discuss them for the reason that all of such matters relate to proceedings prior to the order from which the appeal was taken, and were involved in the appeal. They were collateral or incidental matters and were involved in the appeal. The appeal was a "challenge" to power, and raised all questions now presented by the petitions. It was moot. A case which is moot cannot be retained as a vehicle for raising, discussing and/or deciding the questions involved in the appeal. If that were not true, no case would ever become moot.

Furthermore, the many authorities cited are not pointed up to any specific proposition warranting any relief to petitioner. The greater part of them relate to the right to a stay without bond. There is a solid page of citations (p. 17, Pet. in No. 258) under the proposition that the "order and ruling apparently supercedes and nullifies California statutory law and the decisions of the California Supreme Court," as well as some federal statutes and cases. That is a general statement, involving the effect of such assignments and provisions for stays; and none of the authorities support it. On the following page it is stated that petitioner opposed the dismissal on the authority of four cases there cited. None of these cases furnished appellant the slightest support. The case of U. S. vs. Grant, 345 U. S. 629, 97 L. Ed. 1303, involved a corporate practice against which the lower court issued an injunction, whereupon the practice was discontinued; and merely holds that where illegality is in dispute the case does not become moot unless defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. The Bakery Driver's Union vs. Wagshal case is precisely of the same effect. The Fiswick case merely holds that where one of the consequences of

conviction is deportation, the service of the prison sentence did not render the case moot. Labor Board vs. General Motors is like the first two cases: it could not be demonstrated that the wrong would not be repeated, and it was therefore proper for the court to proceed to enforce the right regardless of the promise of defendant not to repeat the offense. Those cases constitute the strength of the contention that the appeal was not moot.

It will be found, we submit, that no authority has been cited which warrants a review in this case. Since petitioner has not specifically applied any of his citations to his propositions, we must decline to assume the burden of examining each and every citation and thus assume the burden of proving the negative. All of such matters were thoroughly argued on the motion to dismiss.

It is respectfully submitted that the petitions be denied.

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CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing, airmail postage prepaid, to Morris Lavine, Esquire, Bartlett Building, Los Angeles, California, this ____ day of November, 1955.

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